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# THE ECCLESIASTICAL EDICTS

OF THE

# THEODOSIAN CODE

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BY

WILLIAM K. BOYD, A. M.,

*Sometime Fellow in European History in Columbia University,*
*New York City*

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
IN THE
FACULTY OF POLITICAL SCIENCE
COLUMBIA UNIVERSITY

New York
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# PREFACE

THIS monograph has been prepared as a dissertation to complete the requirements for the degree of Doctor of Philosophy in Columbia University. The subject was suggested by a discussion in the seminar of Professor James H. Robinson and by the lectures of Professor Munroe Smith on the History of European Law. To these gentlemen I am indebted for criticisms of style, and to Professor Munro Smith for invaluable aid in the interpretation of certain texts. I am also under obligation to Mr. F. W. Erb, of the Columbia University Library, for courtesies in the loan of books.

WILLIAM K. BOYD.

DARTMOUTH COLLEGE, SEPT. 27, 1905.

# INTRODUCTION

THE blending of civil and ecclesiastical authority in the later Roman Empire is a subject of vast and permanent historic interest. In it the philosophical historian has seen only one of the many evidences of a decline in classical civilization; while the moralist has found it to be the source of all the humane and beneficent influences of the age.[1]

There is one phase of this union of secular and religious forces, the position of the church in the later Roman law, which has never received comprehensive or judicious treatment. For this neglect the large number of edicts on ecclesiastical subjects, their confused style and frequent obscurity, as well as the general unproductiveness during the fourth and fifth centuries of those influences that create law, are responsible. But the subject is an important one, and when some of the difficulties are mastered it has an attraction of its own. For legislation, as no other historical source, reveals the complexity of good and evil in society, and the ecclesiastical edicts of Constantine and his successors show that the church, while a philanthropic institution, was also a disintegrating factor in Roman civilization. Moreover the imperial legislation discloses the origin of those political and social privileges that characterized the church in the middle ages, some of which survive in modern life. The motive underlying the present monograph has been the desire to reach some appreciation of the

[1] Reference is here made to Gibbon, *Decline and Fall of the Roman Empire*, and Schmidt, *Social Aspects of Christianity*.

relationship between church and state in the fourth and fifth centuries, as revealed in the laws of the emperors, and to estimate the influence of that relationship in shaping conditions in mediæval Europe.

The source for our knowledge of the subject is the Theodosian code. Since it was a product of the conditions which characterized the jurisprudence and culture of the later Empire, those conditions demand some preliminary examination.

The fourth century marks an epoch in the history of Roman jurisprudence. The principal influence in the making of law in the Republic had been the *responsae* of the jurists, given in reply to legal questions presented by public officials. These had been given the sanction of the government through the *ius respondendi*, or right of making binding decisions, conferred upon favored jurists by Augustus. The existing law courts were also brought under the imperial authority, and, toward the close of the third century, the legislation of the emperors began to supplant the decisions of the jurists as the supreme source of justice. Law-making was thus governmentalized; and the administration of justice was centered in that vast bureaucracy which tended to dominate every phase of public life.

The beneficent results of this movement were that the ancient law of the city (*ius civile*) was modified, and that the antithesis between *ius civile* and the law developed by the administrative officials (*ius honorarium*) was removed. Consequently the law and custom of Rome and the provinces were blended into one harmonious unity. On the other hand, the centralization of justice resulted in an unfortunate increase of legislation. Anything and everything from the fiscus, the court system and social problems, to the obscure sect of the Tascodrogitæ and the minor issues of ecclesiastical life were subjects of imperial edicts and con-

stitutions. Consequently there was a distinct decline in the knowledge and study of jurisprudence. The laws were frequently drafted by court politicians and rhetoricians. Their language bears evidence of their authorship, for the Latin of the Theodosian code has not the simplicity and strength of the juristic literature of the second and third centuries, while the formation of a vast administrative system necessarily caused the introduction of new words into Roman legal vocabulary.

This confused condition of the law, as well as a general decline in letters, led Theodosius the Younger (408-450) to undertake a revival of Roman culture. To this end he established a university at Constantinople, whose tone, positively Christian, should counteract the influence of a similar institution in Athens, which was pagan in spirit. Two of the chairs in the new university were devoted to jurisprudence. Then, astonished "that so few are found who are endowed with a full knowledge of the Civil Law," impressed with the "enormous multitude of books, the diverse modes of procedure and the difficulty of legal cases and the huge mass of imperial constitutions which, hidden as it were under a veil of gross mist and darkness, preclude men's intellects from gaining a knowledge of them," Theodosius decided to meet "a real need of the age" by attempting two important reforms.[1]

The first of these was outlined in the so-called Law of Citations. It designated the jurists Papinian, Paul, Gaius, Ulpian and Modestinus as legal authorities, confirmed their writings as sources of law, and ordered that, in points of conflict between them, the opinion of the majority should be decisive; if there were an equal division of opinion,

[1] *De Theodosiani Codicis Auctoritate*, p. 90 of Haenel's edition of the Theodosian code.

Papinian should be followed, and, in cases in which these writers made no comment, the judge might form an independent decision. The second reform was the codification of imperial constitutions since Constantine, "so that men may no longer have to await formidable *responsae* from expert lawyers as from an inner shrine." [1]

This work was entrusted to two commissions. The first, of the year 429, was composed of eight noblemen and one jurist; the second, which completed the work, was composed of sixteen members and was appointed in 435. Three years later the result of their labors was published in the east by Theodosius and in the west by Valentinian III. The code is an historical one, its model being the Gregorian and Hermogenian codes—private collections of the third century. This explains the excessive number of edicts, the confusion and conflict in this "short compendium." It was the hope of Theodosius to issue another code for more practical use, a summary of the law "which would not admit of any error or ambiguity and which would show to all what should be followed and what could be avoided"; [2] but this purpose he did not realize.[3]

[1] *De Theodosiani Codicis Auctoritate.*

[2] *Codex Theodosianus*, bk. i, tit. 1, art. 5. (In the following pages this code will be referred to as *C. Th.*)

[3] A word regarding the literary history of the code. An incomplete embodiment of its legislation was preserved in the *Lex Romana Visigothorum* or *Breviary of Alaric*, a Visigothic compilation of the sixth century, which was the principal source of Roman law in southern Europe prior to the twelfth century. The earliest modern editions of the Theodosian code were based upon the *lex romana*. Gradually other fragmentary manuscripts of the code were discovered and these, with the *lex romana*, formed material for textual criticism. Cujacius, the French jurist of the sixteenth century, did more than any other of the earlier editors for the formation of a comparative, critical text. The greatest deficiencies were in the first five books. In the early nineteenth century Peyron and Clossius discovered new manuscripts which

The character and environment of Theodosius, in addition to the forces just reviewed, influenced the selection of the ecclesiastical edicts to be preserved in the code, in all one hundred and forty in number.[1] By nature and education the emperor was as devout as the ascetic ideals of the age could demand. He made "his palace little different from a monastery, for he with his sisters rose in the morning and recited responsive hymns in praise of the Deity." He is said to have learned the Holy Scriptures by heart and he would often discourse with the bishops on scriptural subjects as if he had been an ordained priest of long standing.[2] Consequently the legislation of the Arian emperors in regard to heresy was not included in the code, while the police edicts touching heresy, as well as the more important legislation of those who professed the Nicene faith, were preserved. The edict of Honorius which provided against imperial intervention in episcopal elections was not incorporated, for it was not in keeping with the custom of the east; the edict of Gratian dealing with the authority of the Bishop of Rome over other churches was likewise omitted.

Clerical authorship is evident in this ecclesiastical legis-

corrected many of these defects, and the way was thus opened for the editions of Haenel (*Codex Theodosianus*, 1842, vol. ii of his *Corpus Juris ante-Justiniani*) and of Vesme (*Corpus Juris Romani*, pars i, tom. i, 1839). Theodore Mommsen left uncompleted a new edition for a *Collectio librorum juris ante-Justiniani in usum scholarium*, which has been published since his death in 1903. The ablest commentator on the legislation of the code was Godefroy, a jurist of the seventeenth century. His edition of the code, to which he devoted thirty years, is one of the monuments of legal scholarship (*Codex Theodosianus*, Lyons, 1665). It is indispensable to any historical or comparative study of the code. In this study I have followed the text of Haenel and the criticisms of Godefroy, since the text of Mommsen did not come to hand until after the work was finished.

[1] A few are repeated in different books and titles of the code.

[2] Socrates, *Historia Ecclesiastica*, vii, 22.

lation, especially from the reign of Gratian. The ordination of bishops, the age of deaconesses, the tonsure, celibacy, as well as the weightier problems of episcopal jurisdiction, heresy and apostasy, the immunity of the clergy from taxation, are among the subjects treated. In the language we find such ancient words as *saeculi, antistis, sacrosancta* converted to an ecclesiastical usage and the expressions *lumen de lumine, Deus de Deo, nefariae praevaricationis altaria,* and *sanctissimo catholicae venerabili concilio,* used in an ecclesiastical sense—ample evidence that here the clergy began that participation in civil legislation which characterized European life for so many centuries.

# CHAPTER I

## The Conflict between Paganism and Christianity, as it Appears in the Code

An introduction to the ecclesiastical legislation of the Roman Empire, suggestive of the vast influence which the church acquired in public affairs, is to be found in the attitude of the Christian emperors toward the ancient national religious system, popularly known as paganism. The relation of this system to the Roman government had been primarily political. Since the dawn of Roman history its representatives had received political privileges and exemptions from economic obligations to the state, while in return religion gave a moral support to political institutions. The new career of the church that began with Constantine wrought a vast change in this aspect of Roman civilization. The alliance of paganism and the Empire was dissolved; in its place there developed a union of the Christian church and the state. Yet the ancient religious institutions were so intimately associated with national tradition and custom that the transition from the old order to the new was a gradual one, and in the legislation which discloses it there are three distinct periods.

The first of these includes the laws of Constantine and his sons, which reveal all the characteristics of the religious problem. Constantine, by conferring the rights of a corporation on the church, by exempting the clergy from the economic burdens of citizenship and by introducing the episcopal court into the judicial system, made himself the

subject of praise and reverence in ecclesiastical tradition. But he never withdrew the support which the state had always given to the established religious institutions, and the pagan mould of Roman society was not decisively changed. The exact nature of his religious policy has been the subject of more than three hundred books and monographs since the sixteenth century.[1] Was he actuated by political motives, the desire to balance the Christian and the pagan forces in the Empire, or did political conditions prevent him from making an open attack on the institutions of paganism in behalf of Christianity? Was he at heart a pagan, playing a political game with the church, or was he a Christian, forced by circumstances to tolerate and endure moral and religious conditions with which he had no sympathy?

For the answer to these inquiries there are four classes of evidence; the opinions of literary contemporaries, the testimony of inscriptions, Constantine's general conduct and attitude toward religious institutions, to be gathered from the existing accounts of his life, and lastly his legislation.

As to the first of these, the Christian writers are unanimous in their belief in Constantine's piety and devotion to the church, while the pagan authors never accuse him of hypocrisy. The principal literary source relied upon by those who have doubted the sincerity of his religious professions is Zosimus, the embittered pagan historian of the fifth century.[2] He tells the story of Constantine without reference to Christianity, repeats the slanders upon his character made by Julian, and describes him as a man devoid of humane and religious instincts. But the reliabil-

[1] For bibliography of the literature relating to Constantine, see McGiffert's edition of *Eusebius*, in Schaff's *Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, series 2, vol. i (1890).

[2] *Historia Romana*.

ity of Zosimus is impeached by the contradiction of other sources. His account of the erection of temples in Constantinople by the emperor is not only contrary to Eusebius, but there is evidence that the edifices mentioned were older than the new city.[1] The death of Licinius through the treachery of Constantine is likewise discredited by the probability that his execution was demanded by the army; while the story of Constantine's murder of his wife Fausta is false, since she was living as late as 340, three years after the death of her husband.[2] The general inaccuracy of Zosimus and the anti-Christian tone of his work therefore prevent any reliance upon his narrative unless confirmed by other authorities.

Certain inscriptions have been frequently cited in evidence of Constantine's attachment to paganism, but they are far from conclusive. The petition of the citizens of Hispellum, a town in Umbria, for permission to institute games and a temple in honor of the Flavian gens was indeed granted by Constantine, but with the command that "no building dedicated to our name shall be polluted by the contagion of any superstition;" and no imperial cult in his memory was established until after his death.[3] The claim that the cross was not a symbol of Christianity before the fourth century, and that therefore the *labarum* did not indicate Constantine's conversion from paganism, can no longer be supported. Moreover, the introduction of coins with Christian symbols when the conservative influence of commerce would oppose any alteration in the customary standards of trade,

[1] Victor Schultze, in *Zeitschrift für Kirchengeschichte*, vol. vii, p. 352. He also shows that it is doubtful if pagan ceremonies were used at the foundation of Constantinople.

[2] Schultze, *ibid.*, vol. viii, p. 534.

[3] *Ibid.*, vol. vii, pp. 343, 360.

suggests more than a political motive in the toleration of the church.[1]

If the common criticisms of Constantine's religious character and policy are viewed in the light of the Christian culture of his age, many of their inconsistencies are explained. He lived at a time when many pagan and Christian customs coalesced. If sensuous celebrations in honor of the gods were perpetuated as feasts commemorative of the martyrs, why should the apotheosis of Constantine excite surprise?[2] His baptism, deferred until his last days, was in accord with the Christian custom derived from a belief that that sacrament cleansed its recipient from the guilt of all previous sins. His friendship and association with prominent pagans is no more an impeachment of the sincerity of his religious profession than the similar conduct of Theodosius, the patron of Libanius and Symmachus, men who represented the higher aspirations of Roman religion in its age of decadence. His acceptance of the title of Pontifex Maximus involved no participation in the ceremonial functions of paganism—those were performed by the pontifex—it was but a recognition of his control over the institutions of paganism which was necessary if their connection with Roman life was ever to be dissolved.

If the conditions of Christian custom and culture are reflected in Constantine's attitude toward the religious problem, how much more important must have been the fact that a majority of his subjects were non-Christian in their sym-

[1] Schultze, vol. vii, p. 344.

[2] *Ibid.*, vol. vii, p. 307. The value of these articles of Schultze is that they show how readily certain writers like Burckhardt (*Die Zeit des Konstantin des Grossen*) and Brieger (*Konstantin der Grosse als Religiöser Politiker*) have accepted as evidence for the support of the thesis that Constantine's religious policy was dictated by political motives, statements that they have not subjected to the test of thorough criticism.

pathies? Under such conditions any attack by him upon the prerogatives of paganism in the interest of the church required unusual tact. The situation is clearly revealed in his legislation upon the pagan cults, which falls into two distinct periods, separated by the death of Licinius.

The problems of the first period seem to have been mainly political. In the east Licinus appealed to the religious prejudices of his non-Christian subjects—even resorted to persecution of the church—in preparation for the inevitable conflict with Constantine. It was therefore necessary for Constantine to secure control of the pagan cults in the west in order to prevent any political use of them by the Licinian party. To this end the practice of secret divination and the consultation of the haruspices, except through the regular ceremonies of the temples, were forbidden.[1] The use of magic arts against life or chastity was punished by death; the interpretations of public calamities by the haruspices were required to be transmitted to the emperor; and the compulsive observance of, or participation in, pagan rites by Christians was forbidden.[2] As his panegyrist declares that Constantine fought Maxentius "against the council of men, against the advice of the haruspices," this legislation does not signify a belief in the divinatory arts, rather an effort to forestall any attempt to make use of divination in any political conspiracy against the fortunes of the Flavian family.

The legislation of the second period, which extends from the fall of Licinius, is inspired by something more than a political motive. Its first statute was an edict directed to

[1] *C. Th.*, ix, 16, 1, 2 (A. D. 319). Penalty, death for the divinator and the confiscation of property and exile of the one patronizing him.

[2] *C. Th.*, ix, 16, 3 (Magic); *C. Th.*, xvi, 10, 1. The occasion of the second edict was the injury of the Flavian amphitheatre by lightning in 321.

Palestine, recalling the Christians who had been exiled for their faith, restoring their confiscated property, and relieving them from service in the courts.[1] A general edict was addressed to the provinces which recounted the suffering of the Christians, the vengeance of God on the persecutors, the divine guidance in the personal fortunes of the emperor, and confirmed the policy of toleration established by Galerius and Licinius in the following words:

Let those therefore who still delight in error be made welcome to the same degree of peace and tranquillity which they have who believe. For it may be that this restoration of equal privilege to all will prevail to lead them into the strait path. With regard to those who hold themselves aloof from us, let them have if they please, their temples of lies; we have the glorious edifice of Thy truth, which Thou hast given us, our native home.[2]

This was really a censure of paganism under the guise of an avowal of tolerance. It was followed by the appointment of Christian governors in the east and the renewal of the edicts against divination and domestic sacrifice, which Licinius had not enforced.[3] A more direct attack

[1] Euseb., *Vita Const.*, ii, 34-42.

[2] The authenticity of this edict has been questioned by Schultze (*Ztsch. für K. G.*, vol. xiv) and by Crivellucci (*Della fede storiadi Eusebi nella vita di Constantino*). But Seeck has ably defended it and criticized the objections to it (*Ztsch. für K. G.*, vol. xviii). The chief criticism offered is the blending of the rhetorical and ecclesiastical language. This indicates that it was not the work of Constantine but of several authors. But similar objections might be made to other edicts which are generally accepted as expressing the wishes of some emperor or king. This edict is also the first official declaration of a policy of religious toleration by Constantine. The so-called Edict of Milan was the work of Licinius and was directed to a part of the empire only. (Seeck in *Ztsch. für K. G.*, vol. xii, p. 381). The first edict of toleration was by Galerius in 311.

[3] Euseb., *Vita*, ii, 44, 45.

on the ancient religious system was then instituted by a general prohibition of sacrifices, public as well as private, and of the rebuilding of fallen temples.[1]

After these prohibitions of divination, of sacrifice and of the repair of temples, nothing remained to paganism but its legal privileges. As the cults and the religious sentiment of Rome were associated with the amusements, games, festivals and other phases of popular life, the overthrow of these privileges would have provoked serious protest. Moreover, paganism had still a strong hold on the official and administrative classes, and the legislation against it could be enforced only in those provinces where it was approved by public opinion and imperial officials. These facts explain Constantine's association with prominent men who were devoted to the ancient religious system and his confirmation of the legal rights of paganism. In the light of these conditions, the words of Zosimus that the emperor "indeed used the ancient worship of his country, though not so much out of honor or veneration as of necessity," have an interpretation not implied by their context. Constantine was more than a patron of Christianity, for with him began that legislation by which pagan rites were deprived of their position in Roman civilization, and by which the mould of antique life was replaced by the Christian church.

The policy of Constantine was continued by his sons. While nothing is known of the attitude of Constantine II toward the religious problem, Constans seems to have concurred in the policy of his elder brother, Constantius. In 341 that emperor published an edict which prohibited sacrifices, and five years later he ordered the temples to be closed, that "the possibility of sin might be taken from the lost."[2]

[1] *C. Th.*, xvi, 10, 2; xv, 1, 3. *Cf.* Euseb., *Vita*, iv, 25.

[2] *C. Th.*, xvi, 10, 2, 4.

Soon after, a far more radical insult to religious traditions was offered by Constans. In the senate house stood the altar of Victory, the statue of a woman standing on a globe, with arms extended and a wreath of laurel on her head. Before this altar an offering of wine and incense was made as a prelude to all senatorial deliberations. This symbol of Rome's majesty and grandeur was removed from its place of honor by an imperial order. The indignity became a source of political revolt in the military rebellion led by Magnentius, nominally a Christian, and supported by the discontented pagans in the west, which cost Constans his life in 350.

Constantius, after suppressing the rebellion, emphasized its religious character by interdicting the "nocturnal sacrifices" which Magnentius had tolerated, and in later legislation he threatened with death those who participated in sacrifices, consulted the haruspices, augurs, soothsayers or the magic arts.[1]

Although confiscated temples were often transformed into churches, and sometimes, as at Alexandria, the public officials co-operated with ecclesiastical enthusiasts in the destruction of the memorials of heathenism, these laws restricting paganism were not universally or continuously executed.[2] The association of paganism with Roman life remained unbroken. Constans excepted from the edict closing the temples such as were "without walls," and connected with the games and amusements.[3] While Constantius distributed some of the property of the proscribed cults as gifts to his friends, he entrusted the execution of the laws against the violation of sepulchres to the pagan priesthood. In 356, the

[1] *C. Th.*, xvi, 10, 5, 6; ix, 16, 4, 5, 6 (A. D. 357-358).

[2] Sozomenus, iii, 17; *C. Th.*, x, 1, 8. Sozomenus, iv, 10, is authority for a special edict against paganism at Alexandria.

[3] *C. Th.*, xvi, 10, 3.

year of his last prohibition of sacrifices, he expressed admiration for the temples at Rome and confirmed the legal privileges of the vestals.[1] The enforcement of these edicts against paganism therefore must have been occasional, depending on the temporary passion which inspired them and the public sentiment in the various provinces. In spite of their severity Symmachus could say that, although Constantius followed another religion he conserved the ancient faith.[2]

The religious legislation of Constantine and his sons was rescinded by Julian. The privileges and immunities which had been conferred on the church and clergy were recalled; the pagan temples were destroyed and the services, which had been neglected in the reigns of his predecessors, were re-established. Jovian, the successor of Julian, was a Christian and restored to the church the privileges and some of the property it had lost; but in his short reign of eight months he did not have time to develop a distinct religious policy.[3] Themistius, the pagan rhetorician, praises him for the decision that

> what pertains to religion and the cult of the divine will should be according to the judgment of the individual, thus imitating the Deity, who placed in all men a natural appetite for religion, yet desired that the nature and method of propitiating the divine will should be determined by the preference and free choice of each personality.[4]

This policy of toleration was continued by Valentinian I

[1] *C. Th.*, ix, 17, 2; Symmachus, *Ep.*, x, 54; *C. Th.*, xvi, 10, 6. In 358 paganism was also tolerated in an edict which permitted a public assembly of the "priests of the Province of Africa."

[2] Symmachus, *Ep.*, x, 3.

[3] Soz., vi, 4; Theodoretus, *Historia Ecclesiastica*, iv, 4.

[4] *Oratio de Religione.*

and Valens.[1] The privilege of teaching which Julian had withdrawn from the Christian scholars was restored, and an ecclesiastical veneer was given public life by forbidding judicial processes against Christians to be heard on Sunday, granting amnesty to petty criminals at Easter and excusing members of the theatrical profession who had received baptism from continuing their career.[2] On the other hand, the legal rights of the national religious system were confirmed, and official impartiality toward the litigation over temples that had fallen into the hands of Christians in the reign of Constantine and his sons and had later been restored to the pagan cults by Julian, was preserved by confiscating them to the fiscus.[3] To Ammianus Marcellinus, the pagan historian of this time, Valentinian was "especially remarkable for his moderation" in keeping a "middle course between the different sects of religion," for abstaining from the promulgation of "any threatening edicts to bow down the necks of his subjects to the form of worship to which he himself was inclined," and leaving religious parties "just as he found them."[4]

The official and legal relations existing between paganism and the government were first definitely attacked and abrogated by Gratian. A man of admirable disposition, "eloquent, war-like, and merciful, rivalling the most admirable of his predecessors, even while the down of youth was on

[1] Valentinian issued an edict of toleration in 371 (*C. Th.*, ix, 16, 9).

[2] *C. Th.*, xiii, 3, 6; viii, 8, 1; ix, 28, 3; xv, 7, 1. Valentinian was the first of the emperors to use the word *paganus* (countryman, rustic, soldier) to designate those who remained faithful to the non-Christian cults (*C. Th.*, xvi, 2, 18). It was so used by the ecclesiastics because the stronghold of the ancient Roman religion was in the rural communities.

[3] *C. Th.*, xii, 1, 60.

[4] *Historia Annorum*, xxx, 9, 5. Magic and the occult arts were suppressed by Valentinian but not the haruspices. *C. Th.*, ix, 16, 9.

his cheeks," he was more susceptible to ecclesiastical influences than any of the preceding emperors.[1] Previous emperors had followed the council of church officials in ecclesiastical matters, but Gratian was the first to seek their advice in secular affairs. An incident of his coronation is a prelude to his religious policy. It was the custom for the pontifices to place upon the new sovereign priestly robes and to hail him as Pontifex Maximus; but this part of the ceremony Gratian rejected, declaring that it did not become a Christian prince.[2]

Three years later, after the defeat and death of Valens at Adrianople, Gratian chose Theodosius, a Spanish general, as his associate in the administration of the empire, and left Sirmium for Italy. At Milan he met Ambrose, by far the ablest ecclesiastical politician of the west. There had been some correspondence between them. In a letter full of religious feeling Gratian had requested Ambrose not to depart from Milan before his arrival, for he wished to speak with him and to open his heart to him "for the entrance of divine light." In reply Ambrose sent his tract *On the Faith*.[3] The first result of a friendship so cemented was a change in the emperor's attitude towards heresy from one of toleration to persecution; the second, an attack on the sentiment and institutions of the national religion.[4] In 382 the Altar of Victory, which had, after its removal by Constans, been restored to the senate house by Julian

[1] Ammian. Mar., *Hist. Ann.*, xxxi, 10, 18. For a similar characterization by a Christian author, *cf.* Rufinus, *Hist. Eccles.*, ii, 13.

[2] Zosimus, iv, 36. This story has frequently been rejected, but Schultze has answered the objections to it. *Gesch. des Untergangs des griechisch-römischen Heidenthums*, p. 213, n. 2. Time, 375 or early in 376.

[3] The letter of Gratian precedes the epistles of Ambrose in the edition of Migne's *Patrologia Latina*, vol. xvi, p. 913. *Ibid., De Fide.*

[4] For heresy, see following chapter.

was again taken away by an imperial order.[1] The same year the right to receive gifts and legacies was withdrawn from the pontifical and vestal colleges, their endowments were appropriated to the fiscus, and the privileges and exemptions of the priesthood were also abolished.[2] The pagan members of the senate appointed a committee to present their protest against this violation of the traditional rights of their faith. But the Christian faction sent a counter message through Pope Damasus and Ambrose, with the result that the pagan embassy did not obtain an audience with the emperor.[3]

These events were soon followed by the rebellion in Britain and Gaul, led by Maximus, and the murder of Gratian. The pagan party saw in his death divine vengeance for the desecration and sacrilege he had offered the gods. Its representatives in the senate decided to petition his younger brother and successor, Valentinian II, for the restoration of the Altar of Victory as a step toward the repeal of Gratian's legislation. Symmachus, Prefect of Rome, was leader and spokesman of the committee. His address, made in the presence of the emperor and the senate is a noble plea for the religious system so long and intimately associated with Roman life and institutions.

We ask peace for our native, indigenous gods. We cultivate the same soil, we are one in thought; we behold the same stars, the same heaven, and the same world surrounds us. Why should not each, according to his own prudence, seek the truth? The Great Mystery can not be approached by one road. The divine mind distributed various cults and guardians in the cities; as various spirits in youths, so the fatal

1 Ambrose, *Ep.*, xvii, 18; Symmachus, *Ep.*, x, 3.

2 Symmachus, *Ep.*, x, 3; Ambrose, *Ep.*, xvii, 18; *C. Th.*, xvi, 10, 20.

3 Ambrose, *Ep.*, xvii, 9, 10.

genii are divided among nations. Utility should decide what the gods of man should be. Since all reason is in darkness, what is better than that the recognition of the divinities should be decided by the memory and example of fortunate times. If great age gives authority to religion, such a faith is to be preserved for all ages, and our fathers who happily followed their fathers, are to be followed by us. I do not plead merely the cause of Roman religion; from these recent crimes [the legislation of Gratian] have come all the misfortunes of the Roman people. The law of our fathers honored the vestal virgins and the ministers of the gods with the necessities of life and just privileges. All of these are now diverted to degenerate money changers. Following this came the public famine and a blighted harvest deceived the hopes of all the provinces. Hence are all the misfortunes of the earth. Let us charge nothing to the stars. The year became one of drought through sacrilege, for it was necessary that all things denied to religion should perish.[1]

These words of Symmachus had a profound effect on the Christian as well as the pagan members of his audience. The imperial consistory, in which the Arians held the majority, was inclined toward a favorable reply. But Ambrose, in an address full of sophistry, exhortation and intimidation, won the day. If the Romans were preserved by the gods in the wars with Hannibal, why were the hostages taken? All men serve the emperor, and he serves God. But he who would be loyal to the true God must have no indulgence for the gods that are demons. Idols must be burned and profane ceremonies abolished. To restore the Altar of Victory would be a persecution of Christianity and the emperor would thereby become an apostate. Ambrose even made the threat that if the demands of the pagan

[1] The best edition of the *Relatio* is that of Seeck in the *Mon. Germ. Hist. Antiquiss. Auct.*, vi, p. 280. The translation here given is an abridgment.

party were granted, the clergy would cease to perform their services. Finally, Valentinian's mind was directed to the memory of his deceased father and brother whose piety and loyalty to the church would be seriously offended by the proposed restoration of the Altar of Victory.[1]

Four years later, in 388, Theodosius was called into Italy to protect Valentinian and his court from the invasion of Maximus.[2] He remained in the west three years, suppressing rebellion and reorganizing the imperial administration. During this time he was in intimate relations with Pope Siricius and Ambrose. In 390 the senate again sent an embassy to Theodosius at Milan to ask for the restoration of the Altar of Victory. The emperor hesitated; even the protest of Ambrose was at first ineffective; but finally the petition was refused.[3] The following year Symmachus, who had participated in the rebellion of Maximus and had gained imperial favor through the intercession of Leontius of the Novatian sect, made another plea for the restoration of the Altar. The appeal was in vain; Symmachus was exiled.[4] In the same season, probably after this event, two edicts were issued, one for Rome, the other for the east, which have been well named the requiem of paganism. They forbade any one to pollute himself with sacrifices, to slay an innocent victim, to enter temples, to approach shrines or to do reverence to statues formed by mortal hands.[5] In 392 sacrifice was assimilated with the crime of lese-majesty, the property of the guilty and places of sacrifice were con-

[1] Ambrose, *Ep.*, xvii.

[2] The religious and political aspects of Maximus's revolt will be discussed in the following chapter.

[3] There is some difference of opinion as to the date when the embassy met Theodosius. I follow Rauschen, *Jahrbücher der christlichen Kirche*, p. 316. Amb., *Ep.*, lvii.

[4] Rauschen, *ibid.*, p. 335.

[5] *C. Th.*, xvi, 10, 10, 11.

fiscated, and the cults of the Lares and Penates were prohibited.[1]

When Theodosius returned to the east in 391 he left Valentinian II a protector against the influence of the courtiers in the person of Arbogastes, a Frankish general, who was given the power to appoint all civil and military officers. This authority he exercised in the interest of the Germans and the pagan party.[2] The pagan members of the senate again petitioned for the restoration of the Altar of Victory, but Valentinian declined to grant the request.[3] Then came a quarrel between Valentinian and Arbogastes which resulted in the rebellion of Arbogastes and the murder of Valentinian. The Frankish leader placed Eugenius, a Roman noble and a Christian, on the vacant throne. His religious policy was one of toleration; but he needed the support of all parties and sects in the approaching conflict with Theodosius. He would not permit the restoration of the Altar of Victory, but under the guise of gifts to his friends, he restored many temples to their ancient cults.[4] Pagan ceremonies and processions were revived at Rome and many Christians relapsed to the religious faith they had formerly professed.

In 394 Theodosius returned to the west with an army, defeated the forces of Eugenius and Arbogastes at Aquilea, and then visited Rome. He appeared before the senate and begged its members "to relinquish their former errors and to embrace the Christian faith, which promises absolution from all sins and impieties." When "not one individual could be persuaded," he abolished "the sacred rights and ceremonies recently revived." Many converts from paganism were now made by the church. Among

[1] *C. Th.*, xvi, 10, 12.
[2] Rauschen, *loc. cit.*, p. 360.
[3] Ambrose, *Ep.*, lvii, 5.
[4] *Ibid.*, 6, 8.

these were some of the prominent families of Rome, such as "the venerable assembly of Catos, the luminaries of the world, who stripped themselves of their pontifical garments, cast off the skin of the old serpent and assumed the snowy robes of baptismal innocence, and humbled the pride of the consular fasces before the tombs of the martyrs." [1]

A few months later Theodosius died. It is not necessary to dwell on the importance of his reign in the history of the church. His last thoughts were more for its welfare than that of the empire. Ambrose well compared his zeal for the suppression of paganism to that of Jacob and King Josiah.[2] His religious policy was continued by his sons. Arcadius renewed the legislation of his father, abolished the legal privileges of the priesthood in the east and sanctioned the destruction of the temples.[3] In the west, however, Stilicho, who was entrusted with the regency during the minority of Honorius, desired to moderate the temper of the religious conflict. While sacrifices and "profane rites" were prohibited, the destruction of temples, statues and ornaments of public buildings suggestive of paganism was forbidden and the ancient games were protected.[4] But whatever hopes Stilicho cherished for religious toleration were futile. He alienated the sympathies of the Christians by his indifference toward their religious propaganda, by the introduction of pagans into the imperial service, and the reform of the episcopal courts.[5] On the other hand his

[1] Prudentius; quoted by Gibbon. The authority for the visit of Theodosius to Rome and his effort to convert the Senate is Zosimus, iv, 59; v, 30. This is rejected by some modern writers as a confusion with a visit to Rome after the rebellion of Maximus. *Cf.* Bury's *Gibbon*, vol. i, appendix x.

[2] Ambrose, *De Obitu Theod.*, 4, 35, 38.

[3] *C. Th.*, xvi, 10, 13, 14, 16.

[4] *C. Th.*, xvi, 10, 15, 17, 18.

[5] For episcopal court, see ch. v.

wife, Serena, a zealous Christian, aroused the prejudice of the pagan party. She was accused of taking ornaments from the temple of the Great Mother, and this story was probably responsible for the report that Stilicho had robbed the Temple of Jupiter and burned the Sibylline books.[1] The instability of Stilicho's administration is well illustrated by the invasion of Italy by Alaric in 404. The pagans saw in the event the punishment of the gods for his failure to champion their cause; the Christians explained it as the result of a conspiracy of Stilicho and Alaric and attributed the Roman success at Pollentia to supernatural intervention. After the murder of Stilicho the ecclesiastical party was again in the ascendant. The temples were confiscated and deprived of their remaining income, while bishops, as well as civil officers, were entrusted with the execution of religious law.[2]

Once more, however, the hopes of the pagan party revived when Attalus, a barbarian, placed on "an imperial throne with a purple robe and crown" by Alaric, addressed the senate as "consul and pontifex" and gave prominent pagans important offices of state. But the new régime was temporary; Alaric was soon dissastified with Attalus and deprived him of his crown, and with his fall the last hopes of paganism as a political force in Italy vanished.[3]

[1] Rauschen, *loc. cit.*, p. 558.

[2] Augustine, *De Civitate Dei*, v, 23; Orosius, *Historiorum adversum Paganos*, vii, 38.

[3] In Africa the conflict was prolonged, for there the sentiment in favor of the ancient cults was especially strong. In 415 Honorius confiscated to the fiscus "all places which the error of the fathers dedicated to the service of the gods" in Africa, together with the religious corporations and their incomes, sanctioned the destruction of the statues in the public buildings and deposed the pagan priests from office. *C. Th.*, xvi, 10, 20. The legislation of Valentinian III on heresy and schismatics includes pagans. This indicates that paganism was no longer a political force and was not deemed worthy of much attention.

In the east Theodosius renewed the legislation of his father, abolished the legal privileges of the priesthood and sanctioned the destruction of temples. Here the resistance of paganism was far feebler than in the west, for here the Roman state religion was not indigenous. The decisive legislation was that of Theodosius the Younger in 416, during the regency of Pulcheria, which prohibited the future employment of pagans in civil or military administration.[1] This edict seems to have been effective, for seven years later an edict which renewed former legislation against the adherents of paganism contains the sentence: "We believe that they [the pagans] are no more."[2] Suggestive of the vast change wrought in the traditions of the empire from Constantine to Theodosius the Younger is the last edict of the code, which forbids sacrifices on penalty of death and orders the destruction of temples, if any exist.[3]

[1] *C. Th.*, xv, 10, 21.

[2] *Ibid.*, xvi, 10, 22.

[3] *Ibid.*, xvi, 10, 25.

## CHAPTER II

### Heresy and Ecclesiastical Institutions

The legislation which severed the alliance that, for ages, had united the Roman government and the ancient pagan religious system, has been noted. The change thus wrought in classical traditions and culture is one unprecedented in the religious history of antiquity. It was, however, only one phase of the ever-increasing influence of the church, and its meaning cannot be fully realized without considering a parallel series of edicts, namely, those which treat of heresy and the Christian faith. In analyzing them, the same periods are distinguishable as in the suppression of paganism. Constantine established the precedent for imperial intervention in ecclesiastical affairs; Valentinian I held aloof from the religious conflict; while Gratian and Theodosius finally and decisively fixed the alliance of the state with ecclesiastical creed and persecution.

As all efforts to suppress religious dissension in the first two periods were made by emperors who were, to some degree, patrons of Arianism, their edicts were not preserved by the compilers of the Theodosian code, for they lived in a century when the triumph of the opposing party which pointed to Athanasius as its greatest champion, was complete. The ecclesiastical historians and the controversial writings are therefore the sole authority in forming an estimate of the imperial attitude toward heresy before the reign of Gratian.

Since Constantine desired that the church should contribute to the social and moral strength of the empire, religious dissension was a menace to the public welfare, and if necessary, secular authority might be exercised for its suppression.[1] Indeed, peace and political unity had hardly been established after the period of civil war which followed the death of Diocletian, when the Donatist schism arose in Africa and demanded some attention on the part of the secular authorities.

"The schism of that time throve on the wrath of an angry woman; ambition fostered, and avarice strengthened it," says Optatus—a statement which, if true, indicates that little good was to be expected from the persecution endured by the African church under Diocletian; and unfortunately facts seem to confirm its truth. In 311 the presbyter Cæcilian was chosen bishop of Carthage. His defeated rivals found sympathy in the person of Lucilla, a wealthy matron whom Cæcilian had offended by reproof of her ardent devotion to the saints and martyrs. An issue which would serve to develop opposition to Cæcilian and afford a means of questioning his election was soon found. A few years previous (305), just after the close of the Diocletian persecution, a synod had been held for the election of a new bishop of Cirta. In that meeting Secundus, Primate of Numidia, accused some of the colleagues of betrayal of trust (*traditio*), *i. e.*, of having saved their lives by delivering to the state officials the scriptures and treasures of the church. The election resulted in the choice of Silvanus, one of those accused of this crime. Secundus and his followers were now invited to Carthage by Lucilla and her clerical friends. The validity of Cæcilian's election was questioned. Felix of Aptunga, who had assisted in his

[1] *Cf. C. Th.*, xvi, 2, 3, 6; also Eusebius, *Vita Constantini*, ii, 64.

ordination, was accused of *traditio*, and the claim that only primates could ordain primates was also advanced. The discontented Carthaginian clergy and their imported adherents therefore held a synod and elected Majorinus, a friend of Lucilla, Bishop of Carthage.[1] Such was the origin of the Donatist schism.[2] As time passed, the schismatics emphasized the theory that sacraments administered by polluted hands are ineffective, and the Cæcilianists, when they saw that the Bishop of Rome favored their cause, elaborated the idea of a federation of churches.[3]

The conditions which made Donatism a problem of state were Constantine's restoration of church property that had been confiscated by Diocletian, his gift of money to the African church, and the exemption from public burdens that he conferred on the clergy.[4] It was necessary for the secular officials to decide which party should be the beneficiary of these favors and when the decision was rendered in the interest of the Cæcilianists, the Donatists addressed a protest to the civil authorities, who wrote to Rome for instructions. In reply to a letter from Anulinus, Proconsul of Africa, Constantine, in 313, referred the decision of the schism to the bishop of Rome.[5] A synod was held and its

[1] The Bishop of Carthage was Primate of the Proconsulate Province of Africa.

[2] So-called from Donatus, a reader and successor of Majorinus, who was a prominent leader of the schism.

[3] *Cf.* Voelter, *Der Ursprung des Donatismus*, Freiburg, 1883.

[4] Euseb., *Hist. Eccl.*, x, 5, 6, 7. The first of these documents restores property "to the Catholic church alone." This may mean the church in a general sense, not a distinction between orthodox and schismatical churches. The second, granting money to the African church, shows that Constantine had heard of the schism. The third limits the exemption from public burdens to the Cæcilianists.

[5] The letter of appeal to Constantine given by Optatus (*De Schismate Donatistarum*, i, 22) is rejected by Seeck as a forgery (*Ztsch. für K. G.*, vol. x, p. 550). But that there was such an appeal is shown by

verdict was against the Donatists. They had complained that a complete examination of their cause had not been made, and Constantine therefore ordered another hearing at Arles in 314. In the early part of 315 Aelianus, a civil officer, made an examination, by order of Constantine, of the charges against Felix of Aptunga. Felix was cleared, his successors and prominent Cæcilianists were cited to appear before Constantine. In the meantime the synod of Arles had decided against the Donatists, who then made another appeal to Constantine.[1] A final hearing was granted in the presence of the emperor at Milan in 316, and the verdict was once more against the Donatists. It was ineffective, the schism continued, and this caused Constantine to resort to legislation.

The outlines of the edict authorizing persecution have not been preserved, but the sources indicate that Donatist churches were confiscated and that some of the Donatist leaders suffered death.[2] The fanaticism of the schismatics, however, did not abate and Constantine, seeing that his efforts for peace in the church were ineffective, put an end to the persecution, and during the remainder of his reign the Donatists prospered, establishing churches in Rome and Spain.[3]

the letter of Constantine to Miltiades, Bishop of Rome (Euseb., *H. E.*, x, 5) and by the letter of Anulinus given by Augustine (*Ep.*, 88).

[1] Euseb., *H. E.*, x, 5. Seeck makes the date of the synod 316 and thinks Constantine was present. But this view is not confirmed by the facts. The date is generally conceded to be 314.

[2] There is a reference to the legislation of Constantine in *C. Th.*, xvi, 6, 2, of Gratian. *Cf.* the *Monumenta vetera ad Donatistarum Historiam pertinentia* (Migne, *Pat. Lat.*, vol. viii, p. 750) for the confiscation of property and martyrs. A certain *Sermo de Vexatione Donatistarum temporibus Leontii et Ursatii*, recounts the martyrdom of Donatists at the hands of military authorities.

[3] Augustine, *Brev. Collat. cum Donatist.*, iii, 40; Optatus, ii, 4.

The same desire to preserve unity within the church, rather than the protection of any creed or interpretation of Christian doctrine, led Constantine to intercede for the settlement of the Arian controversy. Soon after the defeat of Licinius in 324 this theological issue, which involved the diverging intellectual traditions of the church, seriously threatened the religious unity of Egypt and the entire east. Believing "disunion in the church" a danger to the state "more grievous than any kind of war," Constantine sent Hosius of Cordova to Alexander and Arius to exhort them to cease contending about "small and inconsiderable questions," for as "philosophers may belong to one system and take issue on certain points," yet "are recalled to harmony of sentiment by the untiring power of their common doctrines," why should not "the ministers of the Supreme God" be "of one mind respecting the profession of the same religion?" [1] When this appeal failed, the emperor, on the advice of the bishops, convoked the general synod of Nicea.[2] He made no attempt to influence the synod's solution of its problem. He desired that the ecclesiastical authorities should make an independent settlement, but he participated in the debates, and, at the critical moment, his influence was effective in the adoption of a creed. He then confirmed the synod's work by threatening with exile those who did not accept its standard of faith and, at the conclusion of the council, he gave its decrees the force of imperial laws.[3]

[1] Euseb., *Vita*, ii, 64.

[2] *Ibid.*, iii, 6. Rufinus, *Historia Ecclesiastica*, i, 5, for convocation by advice of bishops.

[3] Rufinus, *H. E.*, i, 5; Euseb., *Vita*, iii, 17, 19; Socrates, *Historia Ecclesiastica*, i, 9. The Novatians were excepted from the operation of this legislation. *C. Th.*, xvi, 5, 2. The story given by Socrates, that Constantine called the Arians Porphyreans and ordered the works of

The weakness of the Nicene creed lay in the fact that it was in advance of the conservative doctrine of the east and west. However, the west, which habitually looked to authority for guidance, finally accepted the decision of the "great and holy council," while the tendency of the east was to look behind the work of the council to those inherited doctrines which were the predecessors of Arianism. Naturally the opinions in the east and the west at first shaped the policy of their rulers. When Constantine took up his permanent residence in the east, he was influenced by its attitude toward religious problems. Therefore, while he did not repeal the legislation which confirmed the work of Nicea, he permitted the return of the exiled Arians, countenanced the deposition of Athanasian bishops on various charges, and was finally baptized by an Arian bishop, Eusebius of Nicomedia.[1] Both of the efforts he made to restore unity in the church failed. The creed of Nicea, sanctioned by imperial decree, like the legislation against the Donatists, only added increased confusion and complication to the problem it was intended to solve.

The religious as well as the political conditions in the three years succeeding the death of Constantine are obscure. Aside from the statement of Athanasius that Constantine II recalled the exiled bishops, nothing is known of that emperor's policy; while the attitude of Constantius and Constans toward ecclesiastical problems seems to have been shaped by the dominant factions east and west.[2]

Arius to be burned, is spurious. Seeck regards it as a forgery of Athanasius (*Ztsch. für K. G.*, vol. xviii, p. 48), from whose writings Socrates derived the information.

[1] Examples of Constantine's policy are his confirmation of the condemnation of Eustathius of Antioch on a charge of Sabellianism in 330, his citation of Athanasius to the synod of Tyre in 335, and the exile of that ecclesiastic to Gaul after a personal appeal to Constantinople.

[2] Athanasius, *Hist. Ar.*, 8. It has been suggested that the return of

Constantius was gifted with a taste for polemical discussion, his mind had not the catholicity of taste or judgment of his father's, and he was more susceptible to clerical influence. His sympathies were won for Arianism by Eusebius of Nicomedia, and he did not hesitate to give religious intolerance the support of civil authority. Upon the return of Athanasius to Alexandria shortly after the death of Constantine, the Arians of that city met and elected a bishop in the person of Pistus, one of those radical members of their party who had been condemned at Nicea. The followers of Athanasius protested, sending letters to the neighboring bishops, among them to the Bishop of Rome, and perhaps to the emperor Constans, while Eusebius and his coterie in return preferred charges against Athanasius before both emperors.[1] The result was the election of a new Bishop of Alexandria, Gregory of Cappadocia, in the winter of 338-39, by a synod at Antioch, where Constantius was residing. In March 339 the exarch of Egypt published an imperial edict confirming this election, and, after a period of rioting, the new bishop entered Alexandria under military escort.[2]

Similar means were used to enforce conformity in other parts of the east. Bishops from Thrace, Syria, Phoenicia and Palestine were driven from their dioceses before the spring of 340. Of these Lucius of Adrianople, Marcellus

the exiled bishops was due to the effort of Constans and Constantine II to win popularity in the west, and therefore it was not opportune for Constantius to protest. (Loofs, "Arianismus," in *Real-Encyclopedie*, 3d ed., Bd. ii). Seeck, on the other hand, thinks that it was the result of a common policy. He questions the letter of Constantine II which makes the recall of exiled bishops the wish of his deceased father. (*Ztsch. für K. G.*, vol. xvii).

[1] Athanasius, the leader in this movement of protest, defended himself in a letter to Constans. *Apologia ad Con.*, 4.

[2] Ath., *Ep. Encyl.*, written just after the event (*Hist. Ar.*, 14).

of Ancyra, Asklepos of Gaza, and Paul of Constantinople sought refuge at Rome.[1] Julius of Rome addressed a letter of protest in their behalf to the Arian leaders.[2] In reply the synod of Antioch anathematized all who had been associated with Marcella of Antioch, and adopted a statement of doctrine, ante-Nicene in character; while a few months later a new creed was formulated by a second synod at Antioch, which was sent to Constans in the hope that it would reconcile the west.[3]

In the meantime Constans, at the suggestion of some of the western clergy, gained the consent of Constantius for the convocation of a general synod of the church.[4] This body met at Sardica late in 343. All hopes for the formation of a universal creed were defeated by the attitude of the western ecclesiastics, who opposed the reopening of the cases of the Arian bishops recently deposed, and by the consequent withdrawal of nearly all the eastern members from the council.[5] The breach between the two parties was thus widened. The eastern members who had sympathized with the attitude of the west were deposed or exiled. But the succeeding years are notable for the absence of any imperial participation in the Arian controversy. Constantius permitted the return of Athanasius to Alexandria while Constans was engaged in a persecution of the Donatists,

[1] Ath., *Apol. c. Ar.*, 33; Soc. ii, 15. For references to the sources for individual cases, *cf.* Loofs, *loc. cit.*

[2] This was done after a synod of Rome had declared Athanasius and Marcellus illegally deposed. *Cf.* Ath., *Apol. c. Ar.*, 21, 35.

[3] Harnack, *Hist. of Dogma*, vol. iv, p. 67. Athanasius, *De Synod.*, 22, 24. Date, 341.

[4] Ath., *Apol. c. Ar.*, 4.

[5] The eastern members then drew up a statement of doctrine, and also declared Athanasius, Marcellus, Julius of Rome and other leaders of Sardica excommunicated. Socrates, i, 20.

caused by their opposition to imperial gifts to the African church.[1]

After the death of Constans and the end of the rebellion of Magnentius, more radical Arian opinions developed in the east and new accusations were preferred against Athanasius. Constantius, now sole emperor, fell under the influence of Ursacius, one of the most radical and unscrupulous of the Arian bishops. The synod of Arles (353) condemned Athanasius, and the reaction thus begun culminated in the synod of Milan, held in 355. A majority of its members were from the west, but an Arian creed was submitted to them by Constantius, with the order that those who would not subscribe should be exiled.[2] Liberius of Rome, Hilary of Poitiers, and Eusebius of Vercelli suffered the penalty of non-conformity, while Athanasius was expelled from Alexandria by imperial troops. Another radical creed was soon after formulated at Sirmium. The result was a new alignment of ecclesiastical parties. The conservative Arians could not be reconciled to the new radical movement, the resistance of the west to it was assured, while later councils at Ariminum and Seleucia only increased the confusion that already existed.[3]

The attempt of Julian to revive paganism and his hostility to Christianity for a time eliminated political influence from the religious controversy and made heresy once more a purely ecclesiastical problem. His successor, Jovian, professed the Nicene faith, but when "the ring-leaders of contrary factions" approached him "in the interests of their causes," he answered them "in gentle and courteous language" that he would not "molest any religion they pro-

[1] Optatus, *De Schismate Donatistatum*, iii, 3.

[2] Sulpicius Severus, *Chronicon*, ii, 39.

[3] *Cf.* Harnack, *History of Dogma*, vol. i, pp. 75-80.

fessed, but above all others he honored and reverenced such as were peacemakers." [1] In the divided administration which succeeded that of Jovian, the religious policy of the western emperor, Valentinian I, was also one of neutrality. In the beginning of his reign he issued an edict of toleration and when ecclesiastics petitioned him in behalf of their doctrine he replied, "It is not right that I, one of the laity, should examine curiously things of this nature. This is for the consideration of priests, and whatever they shall decide should come to pass." [2]

The policy of Valens, emperor of the east, was also at first one of toleration. But he soon fell under the influence of Eudoxius, one of the radical Arians. When representatives of the synod of Lampsacus (364) informed him of its work and the doctrine it represented, Valens "exhorted them not to be at variance with Eudoxius." Upon their remonstrance he sent them into exile and "ejected from the churches or maltreated and harassed in some other form" those "not in communion with Eudoxius." [3] The conservative Arians suffered as much as the Athanasians and the result was to unite the two into a new Nicene party which gained ascendency under Theo-

[1] Socrates, *H. E.*, iv, 25.

[2] The edict of toleration is not extant. It is referred to in *C. Th.*, ix, 16, 9. The quotation is from Soz., *H. E.*, vi, 7. The letter of Valentinian to an Illyrian synod, directing its members to subscribe to the Nicene creed, given by Theodoretus, *H. E.*, iv, 8, is doubtless a forgery. But in the year preceding his death (375), according to Theodoretus (*Historia Ecclesiastica*, iv, 7), Valentinian endorsed the dogma of the Athanasian party. This chapter of Theodoretus has been rejected by Hefele (*Concilien Geschichte*, vol. i, p. 741) and accepted by Schiller (*Gesch. der röm. Kaiserzeit*, vol. ii, p. 364). If the statement of Theodoret is true, the change in policy could have had but little effect, for the Gothic war opened the following year and prevented persecution.

[3] Soz., vi, 7. *Cf.* vi, 12, which says that the bishops exiled by Constantius and recalled by Julian were ejected from the churches.

dosius. Yet the extent and nature of the persecution by Valens are uncertain. Only six cases of the deposition of bishops as the result of his reactionary policy are known, and of these, Athanasius was finally recalled to Alexandria. The statement of Sozomenus, that the persecuted "sustained torture of body, were carried to the tribunals of the presidents [of the provinces], and on account of the faith of which they were found guilty were deprived of their property" may be the result of a confusion of the police measures against the Egyptian monks with the persecution of doctrine.[1] Yet, in 373 Themistius, a distinguished pagan philosopher, addressed an oration to Valens on behalf of the persecuted. Finally, at the opening of the Gothic war in 376, an edict of toleration to all sects was issued and the persecution ceased.[2]

The reigns of Gratian and Theodosius, decisive for the relation between the government and paganism, were equally decisive for the problem of heresy. One of the first acts of Gratian was to reverse the tolerant policy of his father, Valentinian I, and, in the interest of the Nicene party, always dominant in the west, to forbid meetings of heretics and to confiscate their places of assembly to the fiscus.[3] In 378 this law was re-enacted, but later in the same year, perhaps after the death of Valens, toleration was granted to all sects except the Eunomians, Photinians and Manichæans.[4] But after the meeting of Gratian and

[1] Soz., vi, 14; *C. Th.*, xii, 1, 63; Soc., iii, 22, 23.

[2] The oration of Themistius is not extant. It is mentioned by Soz., vi, 36. The twelfth oration on tolerance was made at an earlier date, perhaps at the beginning of the reign. For the edict of 376, *cf.* Soc. iv, 35.

[3] This edict is not extant. It is referred to in *C. Th.*, xvi, 5, 4. Date, late in 375 or early in 376.

[4] *C. Th.*, xvi, 5, 4. Haenel makes the date 376. Rauschen (*loc. cit.*, p. 330, n. 1) and Godefroy make it 378; *cf.* Soc. v, 2; Soz., vii, 1. The

Ambrose in 379, the edict of toleration was rescinded, and all heresies opposed to laws divine and imperial were ordered to come to an end.[1] Gratian, however, was by nature humane and moderate. In spite of this legislation and the influence of Ambrose, the Arians of Milan were permitted to retain possession of one basilica until the insult of Ambrose by the Arians of Sirmium.

A far more drastic policy toward heresy was pursued by Theodosius. In 380 he was seized with a serious illness at Thessalonica and was baptized by Acholeus, a Nicene bishop.[2] After his recovery he issued an edict to the people of Constantinople that "all who are under the sway of our clemency shall adhere to that religion which, according to his own testimony, coming down to our own day the blessed Peter delivered to the Romans, namely, that doctrine which the Pontiff Damasus, and Peter, Bishop of Alexandria,

Eunomians and Photinians were Arian sects; the former thought that the Son is of different essence from the Father and that he is created out of nothing; the latter made the divinity of Jesus a growth by moral improvement on the basis of human nature. The Manichæans will be discussed later.

[1] *C. Th.*, xvi, 5, 5. *Impp. Gratianus, Valentinianus et Theodosius A. A. A. ad Hesperium Pf. P.* Omnes vetitæ legibus et divinis et imperialibus haereses perpetuo conquiescant. Quisquis opinionem plectibilibus Dei profanus imminuit, sibi tantummodo nocitura sentiat, aliis obfutura non pandat. Quisquis redempta venerabili lavacro corpora reparata morte tabificat, id auferendo, quod geminat, sibi solus talia noverit, alios nefaria institutione non perdat. Omnesque perversæ istius superstitionis magistri pariter et ministri, seu illi sacerdotali assumptione episcoporum nomen infamant, seu, quod proximum est, presbyterorum vocabulo religionem mentiuntur, seu etiam se diaconos, cum nec Christiani quidem habeantur, appellant, hi conciliabulis damnatae dudum opinionis abstineant. Denique antiquato rescripto, quod apud Sermium nuper emersit, ea tantum super catholica observatione permaneant, quae perennis recordationis pater noster et nos ipsi victura in aeternum aeque numerosa iussione mandavimus. Dat. III Non. Aug. Medioliano, Acc. XIII Kal. Sep. Ausonio et Olybrio Coss. (379).

[2] Soz., vii, 4.

men of apostolic sanctity, now follow," *etc.*[1] In January of the following year another edict forbade the heretics to assemble within the cities, required the name of the one and supreme God to be celebrated, and the Nicene faith, as handed down by the fathers and confirmed by the testimony and assertion of divine religion, to be always maintained.[2] In the same year, after the reformulation of the Nicene doctrine by the Council of Constantinople, which was convoked by the emperor to adjust problems of doctrine, the

[1] *C. Th.*, xvi, 1, 2.

[2] *C. Th.*, xvi, 5, 6; xvi, 5-6. *Ibid., A. A. A.* (*Gratianus, Valentinianus et Theodosius*). *Eutropio Pp. P.* Nullus haereticis mysteriorum locus, nulla ad exercendam animi obstinatioris dementiam pateat occasio. Sciant omnes, etiamsi quid speciali quolibet rescripto per fraudem elicito ab huius modi hominum genere impetratum est, non valere. § 1. Arceantur cunctorum haereticorum ab illicitis congregationibus turbae. Unius et summi Dei nomen ubique celebretur; Niceanae fidei, dudum a maioribus traditae et divinae religionis testimonio atque assertione firmatae, observantia semper mansura teneatur; Photiniae labis contaminatio, Ariani sacrilegii venenum, Eunomiae perfidiae crimen et nefanda monstruosis nominibus auctorum prodigiae sectarum ab ipso etiam aboleantur auditu. § 2. Is autem Nicaenae assertor fidei et catholicae religionis verus cultor accipiendus est, qui omnipotentum Deum et Christum filium Dei unum nomine confitetur, Deum de Deo, lumen de lumine; qui spiritum sanctum, qui id, quod ex summo rerum parente speramus, accipimus, negando non violat: apud quem, intemeratae fidei sensu, viget incorruptae trinitatis indivisa substantia, quae graeci assertione verbi ουσια, recte credentibus dicitur. Haec profecto nobis magis probata, haec veneranda sunt. § 3. Qui vero iisdem non inserviunt, desinant affectatis dolis alienum verae religionis nomen assumere, et suis apertis criminibus denotentur. Ab omnium summoti ecclesiarum limine penitus arceantur; cum omnes haereticos illicitas agere intra oppida congregationes vetemus, ac, si quid eruptio factiosa tentaverit, ab ipsis etiam urbium moenibus exterminata furore propelli iubeamus, at cunctis orthodoxis episcopis, qui Nicaenam fidem tenent, catholicae ecclesiae toto orbe reddantur. Dat. IV Id. Ian. Constantinopali, Eucherio et Syagrio Coss. (381).

The phrases, "Deum de Deo, lumen de lumine," lead Godefroy to think that the edict was published after the council of Constantinople, for they appear in the creed formulated at the council. But the date of the edict in both the Theodosian and the Justinian codes is January, while the council did not convene until May, 381.

proconsul of Asia was ordered to deliver all churches to those bishops "who profess that the Father, Son, and Holy Spirit are one majesty and virtue, the same glory, one light making no confusion by profane division, but are the order of the Trinity, the incorporation of persons, and unity of the Divinity." [1]

The Arians did not surrender without protesting their right to exist. In the east "great disturbances arose as they were ejected from the churches." [2] This and the conflicting claims of orthodox churches to the property of heretical congregations led Theodosius to convene a general conference of all sects at Constantinople in 383. He also hoped that by a discussion with their bishops unanimity of belief might be established.[3] But instead of a free exchange of opinion, the members of the council were asked if they would accept as authoritative the teaching of those fathers who lived previous to the dissension in the church. When Theodosius received no satisfactory reply, he commanded the sects—the Arians, Eunomians, Macedonians and Novatians—to draw up written statements of

[1] *C. Th.*, xvi, 1, 3. The bishops representing the faith are named. They are Nectarius of Constantinople, Necrarius of Alexandria, Pelagius of Laodicea, Diodorus of Tarsus, Amphilocus of Iconia, Optimus of Antioch, Helladius of Cæsarea, George of Nyssa, Terrenus of Scythia, Marmoria of Martianopolis and Olreius of Meletus. All bishops who differed from the faith of these were to be expelled from their dioceses. (*Cf.* Soz., vii, 9.) It is notable that there is no mention of any western bishops. The reason is obvious. Arianism was primarily an eastern problem and Theodosius wished to solve it by appealing directly to the east and avoiding any appearance of tutelage of the east by the west. *Cf.* Harnack, *History of Dogma*, vol. ii, p. 95, n. 1, on the policy of Theodosius.

[2] Soz., v, 10.

[3] *Ibid.* This procedure was adopted by Theodosius at the suggestion of Nectorius of Constantinople, to whom it was suggested by Sisennius, a Novatian.

their creeds. These were submitted to him at the palace, and after prayer, he destroyed them all except that of the Novatians. The other sects withdrew from the council and soon they were forbidden to hold meetings, to ordain priests or to promulgate their doctrines, and their places of assemblage were confiscated to the fiscus.[1]

The hopes of Arianism now centered in the west. There the proscribed faith found a patron in the person of Justina, widow of Valentinian I and mother of Valentinian II. After the death of Gratian her influence at court was supreme and Arian officials and Gothic troops found their way into the imperial service. Ambrose was petitioned for the use of a small basilica near the city of Milan where the Arians might celebrate the Easter of 385 according to their own rites. He refused, and when the request was repeated, he advanced in his reply the theory that property once in

[1] *C. Th.*, xvi, 5, 11, 12, 13. Besides the sects above mentioned, the Apollinarists, Manichæans, and certain sects of minor importance were included. The twelfth edict is typical.

Vitiorum institutio Deo atque hominibus exosa, Eunomiana scilicet, Ariana, Macedonia, Apolinariana, ceterarumque sectarum, quas verae religionis venerabili cultu catholicae observantiae fides sincera condemnat, neque publicis, neque privatis aditionibus intra urbium atque agrorum ac villarum loca aut colligendarum congregationum aut constituendarum ecclesiarum copiam praesumat, nec celebritatem perfidiae suae vel solennitatem dirae communionis exerceat, neque ullas creandorum sacerdotum usurpet atque habeat ordinationes. Eaedem quoque demus, seu in urbibus seu in quibuscunque locis passim turbae professorum ac ministrorum talium colligentur, fisci nostri dominio iurique subantur, ita ut hi, qui vel doctrinam vel mysteria conventionum talium exercere consueverunt, perquisiti ab omnibus urbibus ac locis, propositiae legis vigore constricti expellantur a coelibus, et ad proprias, unde oriundi sunt, terras redire iubeantur, ne quis eorum aut commeandi ad quaelibet alia loca aut evagandi ad urbes habeat potestatem. Quod si negligentius ea, quae serenitas nostra constituit, impleantur, et officia provincialium iudicum et principales urbium, in quibus coitio vetitae congregationis reperta monstrabitur, sententiae damnationique subdantur. Dat IV Non. Sept. Constantinopali, Merobaude II et Saturnino Coss. (383).

the possession of the church is the property of God, that priests must administer it and never permit its reversion to the world.[1] When it seemed that the court party would resort to force, Ambrose threatened the soldiers with excommunication. Public opinion was with him; the Nicene soldiers left their Arian captains and a temporary reconciliation between Ambrose and Valentinian followed.[2] But in 386 the emperor gave the Arians the right of assemblage and declared that its violators would be guilty of *maiestas* and liable to the death penalty.[3] When Ambrose again refused to allow the Arians the use of church property Valentinian issued a decree exiling him. Ambrose replied that the emperor was within the church, not over it, and that in matters of faith the layman has no jurisdiction over the priest.[4] The sympathies of the people were again with him, and Valentinian did not attempt to enforce the decree of exile.

This quarrel of Ambrose and the Arian court was interrupted, in 387, by the invasion of Italy by Maximus. In 383 Maximus had been proclaimed Augustus by the army in Britain; after the murder of Gratian he extended his authority to Gaul and Spain, and was recognized by Valentinian and Theodosius.[5] He now appeared in Italy as the champion of the Catholic faith.[6] Justina and Valentinian

[1] Amb., *Ep.*, xx.

[2] See Rauschen, *loc. cit.*, pp. 212-214, for summary of events, with references to the sources.

[3] *C. Th.*, xvi, 1, 4; 4, 1. [4] Amb., *Ep.*, xxi.

[5] All the sources except Zosimus agree that the elevation of Maximus was the work of the army. *Cf.* Rauschen, *loc. cit.*, p. 143, n. 2. In regard to the death of Gratian the sources vary. *Cf.* the discussion of Rauschen, p. 482. For recognition by Valentinian and Theodosius, *ibid.*, pp. 144 and 172.

[6] There is a letter of Maximus to Valentinian threatening him with war if he did not cease his opposition to the Catholic faith. (Theo-

fled to Thessalonica and implored the aid of Theodosius. After cementing a political alliance by marriage with Galla, sister of Valentinian, Theodosius assembled a large army and, in the summer of 388, invaded Italy, and defeated Maximus in two battles in Pannonia, where he was taken prisoner and executed. At the opening of the campaign Valentinian had withdrawn from the Arians their rights of assemblage, of erecting altars for worship and of celebrating the sacraments.[1] Since Justina died during the war, there was no hope for the toleration of paganism in the reorganization of administration in the west.

While Theodosius was in Italy the activity of the heretics in Constantinople also demanded the attention of the civil authorities. The legislation of the previous years had not been rigorously enforced. In 387 the Arians and Apollinarists held public meetings at Constantinople and the Eunomians conducted a religious propaganda in Cappadocia.[2] Consequently, before the invasion of Italy, an edict was published which withdrew from the heretics the right of residence in the cities and forbade the ordination of their officials.[3] Then, before the decisive battle with Maximus, a report was circulated in Constantinople that Theodosius had been "cut to pieces and that he himself had been captured." The Arian sects were elated and burned the house of Bishop Nectorius, and another report, that the emperor had issued a tolerant edict, was circulated.[4]

doret., *H. E.*, v, 14.) This writer also says that Theodosius wrote to Valentinian that it was no wonder that Maximus was successful, for he defended, while Valentinian persecuted, the orthodox faith. *Ibid.*, v, 15.

[1] *C. Th.*, xvi, 5, 15. [2] Greg. Naz., *Ep.*, 202. *Cf.* Soz., vi, 27.

[3] *C. Th.*, xvi, 5, 15. This was probably due to the influence of Gregory Nazianzus and Nectorius of Constantinople.

[4] Soz., vii, 14.

These conditions were responsible for two edicts which forbade public discussions of religion, the publication of religious tracts, and threatened with the punishment of a forger (*falsi reus*) the one responsible for the report of the tolerant legislation.[1] After the return of Theodosius to the east he repeated the prohibition of the residence of heretics in Constantinople, and of their ordination, as well as the confiscation of places of worship, in 392 and 394—sufficient evidence that heresy was one of the numerous problems which the imperial administration could not promptly or efficiently solve.[2] But when Arcadius, in a series of edicts, confirmed and re-enacted his father's legislation, many heretics became reconciled to the orthodox church and heresy ceased to be a political problem of importance in the east.[3]

In the policy of Gratian and Theodosius toward heresy there is a perceptible change from that of their predecessors. The motive which actuated Constantine's interest in problems of faith was one of expediency, a desire for unity in the church, because that was conducive to the welfare of the state. After all is said of Constantius's religious opinions, the political aspects of heresy were to some extent responsible for his policy, while the military character of Valens and his toleration of paganism suggest that a desire for ecclesiastical unity rather than personal interest in any one creed was responsible for the persecution he instituted. The efforts of these emperors to establish religious unity

[1] *C. Th.*, xvi, 4, 2; *ibid.*, 5, 16. A special edict for the Apollinarists was drafted. *C. Th.*, xvi, 5, 14.

[2] *C. Th.*, xvi, 5, 21, 22, 24; *cf.* 4, 3.

[3] *C. Th.*, xvi, 5, 25, 26, 30. *Cf.* Soz., viii, 1. The character of Arcadius's legislation shows that heresy was not a serious political problem. It repeats the penalties so frequently inflicted on heresy and is directed against heretics in general.

were directed against ecclesiastical leaders and officials. In the legislation of Gratian and Theodosius, however, religious conviction was a stronger motive than political expediency. Therefore the lay as well as the ecclesiastical members of the sects were proscribed. An evidence of this change in purpose is the conception of heresy as it affected the rights of citizenship. Theodosius made the violation of divine law equivalent to sacrilege, and such violation involved the loss of certain rights of Roman citizenship.[1] First, the power of leaving or receiving legacies, one of the distinctive privileges of Roman citizens, was taken from the Manichæans in 381, then from the Eunomians in 389.[2] Honorius extended this legal disability to the Donatists and Priscillianists, while Theodosius the Younger applied it to all sects.[3] The right to hold office at court or in the army was withdrawn from the Eunomians by Theodosius; Honorius excluded all enemies of the Catholic sect from service in the palace; and, finally, Theodosius the Younger forbade heretics to take the military oath of allegiance or to serve in the imperial army.[4] Apostates—those forsaking the

[1] *C. Th.*, xvi, 2, 25. Qui divinae legis sanctitatem aut nesciendo confudunt aut negligendo violant et offendunt, sacrilegium committunt (380).

[2] *C. Th.*, xvi, 5, 7, 17. The latter edict imposing the disabilities on the Eunomians was repealed in 394 on account of domestic troubles and the friendship of Eutropius for the heretics. *C. Th.*, xvi, 5, 23. It was re-enacted by Arcadius, *ibid.*, 5, 25.

[3] *C. Th.*, xvi, 5, 40, 65.

[4] *C. Th.*, xvi, 5, 29. *Marcello Magistro officiorum.* Sublimitatem tuam investigare praecipimus, an aliqui haereticorum vel in scriniis vel inter agentes in rebus vel inter palatinos cum legum nostrarum iniuria audeant militare; quibus, examplo divi patris nostri, omnis et a nobis negata est militandi facultas. Quoscunque autem deprehenderis culpae huius affines, cum ipsis, quibus et in legum nostrarum et in religionum excidium conniventiam praestiterunt, non solum militia eximi, verum etiam extra moenia urbis huiusce iubebis arceri. Dat. VIII Kal. Dec. Constantinopali, Olybrio et Probino Coss. (395). *Ibid.*, 42. Eos, qui

Christian faith—suffered likewise. Constantius had deprived Christians who became converts to Judaism of their testamentary privileges, and Theodosius extended the penalty to those forsaking the church for the pagan rites, permitting the revocation of their testaments.[1] The ecclesiastical conception of the offence is reflected in an edict of Valentinian II which declares that those who desert and profane the right of sacred baptism "should be segregated from the companionship of all," cast out and banished unless they do major penance; not even then can they return to their former position in society "since those who pollute the faith which they have vowed to God are not able to behold those things which are ideal and just.[2]

catholicae sectae sint inimici, intra palatium militare prohibemus, ut nullus nobis sit aliqua ratione coniunctus, qui a nobis fide at religione discordat. Dat. XVIII Kal. Dec. Ravenna, Bosso et Philippo Coss. (408). *Ibid.*, 48. Montanestas et Priscillianistos et alia huiusce modi genera nefariae superstitionis per multiplicita scita divalia diversa ultionum supplicia contemnentes, ad sacramenta quidum militiae, quae nostris obsecundat imperiis, nequaquam admitti censemus, *etc. Ibid.*, 65.

[1] *C. Th.*, xvi, 8, 7; *ibid.*, 7, 1. Eis. qui ex Christianis pagani facti sunt, eripiatur facultas iusque testandi, et omne defuncti, si quod est, testamentum summata conditione rescindatur (381). Such legislation would naturally cause confusion in the possession and administration of Roman property. It was, therefore, modified by subsequent edicts. Theodosius allowed catechumens relapsing to paganism to leave their property to their children and brothers (*C. Th.*, xvi, 7, 2), and Arcadius forbade apostates to alienate property from their own blood (*ibid.*, 7, 6). Other legislation determined the method by which testaments might be revoked. According to the edict of Gratian, an action to declare a testament void (*inofficiosum*) must be brought within five years of the testator's death. (*C. Th.*, ii, 19, 5.) Valentinian II states that this rule applies to actions against apostate testaments, but the action cannot be instituted by an apostate against an apostate. (*C. Th.*, 7, 3.) But Valentinian III abolished the time limit and the prohibition of apostates from bringing an action. (*Ibid.*, 7, 7.)

[2] *C. Th.*, xvi, 7, 4. Impp. Valentinianus, Theodosius et Arcadius A. A. A. Flavanus Pf. P. Hi, qui sanctam fidem prodiderint et sanctum baptisma profanerint, a consortio omnium segregati sint, a testimoniis

The attitude of the state toward the Jews also seems to have been affected by clerical influences. Honorius and Theodosius the Younger excluded them from military and all other public services except municipal offices, while an even stronger suggestion of their position in mediæval society was the law which gave temporal officials the right to inspect and increase the taxes paid into the public treasury by the Jewish communities.[1]

alieni, testamenti, ut ante iam sanximus, non habeant factionem, nulli in hereditale succedent, a nemine scribantur heredes. Quos etiam praecepissemus procul abiici ac longius amandari, nisi poenae visum fuisset esse maioris, versari inter homines et hominum carere suffragiis. § 1. Sed nec unquam in statum pristinum revertentur, non flagitium morum obliterabitur poenitentia neque umbra aliqua exquisitae defensionis aut muniminis obducetur, quoniam quidem eos, qui fide, quam Deo dicaverant, polluerunt et prodentes divinum mysterium in profana migrarunt, tueri ea, quae sunt commenticia et concinnata non possunt. Lapsis etinim et erantibus subvenitur, perditis vero, hoc est sanctum baptisma profanantibus, nullo remedeo poenitentiae, quae solet aliis criminibus prodesse, succuritur. Dat. V Id.Maii Concordiae, Tatiano et Symmacho Coss. (391).

[1] *C. Th.*, xvi, 7, 6, 7; 8, 24, 29. There are twenty-nine edicts on Judaism in the eighth title of the code, and five in the ninth. There are three periods in this legislation. First, the reigns of Constantine and Constantius, in which Jews were prohibited from punishing those leaving their faith, from circumcising their slaves and trafficking in Christian slaves, while the marriage of Jews to Christian women and the conversion of Christians or Roman citizens to the Jewish faith was also forbidden. Jews were also subjected to curial obligations. The second period extends from Julian to Theodosius, a period of toleration, in which there was no new legislation. Theodosius was urged to legislate against the Jews by Ambrose (*Ep.*, 29), but we find him comparatively tolerant. The third period is that of the sons and successors of Theodosius. Rufinus and Eutropius were generous to the Jews, but Theodosius II interdicted the erection of new synagogues, forbade Jewish patriarchs to decide cases between Jews and Christians, and the possession of Christian slaves by Jews; but an exception was made in favor of Gamaliel, a patriarch in honor at the court. For the condition of the Jews at Alexandria, *cf.* Socrat., vii, 15. Also *C. Th.*, xvi, 8, 18, 21. On the condition of Jews in the later empire, see Gratz, *Geschichte der Juden*, vol. iv.

## CHAPTER III

### Heresy and Ecclesiastical Institutions (Continued)

The Roman religion of the second and third centuries gives the impression of a mosaic to which tradition, superstition, poetry, and a genuine spirit of inquiry lend their shares, and in which persecution was the exception, not the rule. The repression of heresy by secular force therefore suggests two questions: what motive for persecution other than religious convictions appealed to the emperors, and what change was wrought in the tolerant spirit of the empire by the persecution of the Christian sects? No definite answers can be given, but there are certain conditions and facts which modify the impressions which the preceding legislation may leave concerning the intolerant influence of the church.

In the first place, the social aspects of certain sects made them the subject of legislation. Chief among these were the Manichæans. Their doctrines were never attractive to the multitude; only the thoughtful and devoutly minded were drawn into the sect, says Augustine. The ascetic, secret character of their teaching, their questionable attitude toward family life and the popular prejudice which associated with their services magical and immoral practices made them obnoxious. Diocletian ordered them to be exiled, their leaders to be subjected to capital punishment and their property to be confiscated to the fiscus.[1] The

[1] *Codex Gregorianus*, xiv, 4.

tolerant Valentinian I was active in the suppression of the magic arts and so ordered the Manichæan teachers to be fined, and their places of meeting to be confiscated.[1]

Theodosius took from the Manichæans and similar obnoxious sects the right of making and receiving legacies, confiscated their property bequeathed to their sons, if these were of the same faith as their fathers, and interdicted any celebration of their rites, while Valentinian the Younger forbade their residence in all parts of the Roman world, especially at Rome, under penalty of death.[2] Their stronghold in the west was Africa, where, with the Donatists, they were the subject of frequent legislation by Honorius.[3]

The social aspects of the Donatist schism also made it a subject of legislation in the later fourth and early fifth centuries. The emperors from Constantine to Honorius, with the exception of Constans, permitted the Donatists to remain unmolested. The edicts of Gratian and Valentinian which mentioned them were not enforced outside of Italy. But finally when the schism broadened from an ecclesiastical quarrel to a source of civil disorder, persecution was resorted to.

The Circumcellions, a mendicant, socialist sect, were appealed to for aid by the Donatists at the time of the persecution of Constans. Northern Africa was soon infested with a body of religious fanatics, escaped slaves, erring priests and nuns who tortured the Catholics, defiled churches and forced the laity to accept Donatist baptism. In 395 Theodosius died and Gildo, a native prince and friend of the Donatists, usurped the administration of Africa. A period

[1] *C. Th.*, xvi, 5, 3. *Cf. C. Th.*, ix, 16, 7, 8, 10, 11.

[2] *C. Th.*, xvi, 5, 7, 18. The other sects were the Encraticae, Apotaclitae, Hydropharastitae and Saccafari.

[3] *Cf.* the edicts mentioned in the following paragraphs.

of wild religious license now opened; when Gildo was overthrown in 398, the Catholics took vengeance by having Honorius repeal the privilege of assemblage given the Donatists by Julian.[1] In 405 Honorius, in reply to a petition of an African council of the preceding year, also declared the Donatists to be heretics, confiscated their places of assembly, excluded them from testamentary rights, and imposed fines upon them.[2]

A dreary civil war ensued. Upon the death of Stilicho in 408, the Donatists claimed that the laws made during his regency now passed out of effect. But Olympus, the successor of Stilicho, was a Christian, and in answer to petitions from Augustine and a synod of Carthage, the legislation against the schismatics was confirmed.[3] The Catholic bishops then expressed their thanks to the emperor and informed the civil authorities of the nature of the law. In 409, on account of the sympathy of the Donatists for Attalus, the rival emperor set up by Alaric, the enforcement of the legislation against them was forbidden.[4] But in the following year the army sent to Africa by Attalus was defeated, "the decree which the followers of heretical superstition had obtained to protect their rites" was rescinded, and "the penalty of proscription and death" was imposed for their "criminal audacity in meeting in public."[5] The tribune Marcellinus was appointed to convoke and preside over a conference of Donatists and Catholics. This occurred in June, 411; the decision was in favor of the Catholics, and the Donatists were ordered to deliver up their

[1] *C. Th.*, xvi, 5, 37.

[2] *C. Th.*, xvi, 5, 38, 39. It is interesting to note that this was the first state legislation on heresy approved by Augustine.

[3] *C. Th.*, xvi, 5, 44, 45, 46. The latter seems to be in response to the synod of Carthage.

[4] *Ibid.*, 5, 47.

[5] *Ibid.*, 5, 51.

churches and to accept the Catholic faith. Honorius renewed the penalties against them in 414, branded them with perpetual infamy, and in 415 threatened with death all Donatists who dared to celebrate their religious rites.[1] The persecution now began its final and most bloody period. The Donatists in despair grew indifferent to life. They attacked armed bodies of Catholics and, rather than fall into the hands of their enemies, often committed suicide.[2] The conflict continued until the invasion of Africa by the Vandals. The persecution of the church which the latter instituted, obliterated the rivalry of Donatist and Catholic.

Religious dissension was indeed one of the characteristics of the age. Gregory of Nyssa has left a graphic picture of mechanics and slaves who were profound theologians. "If you desire a man to change a piece of silver he informs you wherein the Son differs from the Father, and if you ask the price of a loaf you are told by way of reply that the Son was created out of nothing."[3]

Some interference in religious matters by the state was therefore only natural, perhaps unavoidable; but while the legislation regarding heresy is abundant, the information regarding its execution is meager. Sozomenus says of Theodosius that, "great as were the penalties adjudged by the laws against heretics, they were not always carried into execution, for the emperor had no desire to persecute his subjects, he desired only to enforce uniformity of belief about God through the medium of intimidation."[4] If the

[1] *C. Th.*, xvi, 5, 55 (of 412); 54 (of 414); 55 confirms the penalties imposed during the administration of Marcellinus, its occasion being the appointment of a new governor of Africa. *Cf.* 56, 57, 58.

[2] Augustine, *Ep.*, 185.

[3] *Oratio de Filio et Spiritu Sanctu.* Migne, *Pat. Lat.*, vol. xlvi, p. 357.

[4] *H. E.*, vii, 12.

edicts of Theodosius were not rigorously enforced, what must be said of the legislation of his inefficient successors?

No special courts were established for the prosecution of heretics. The laws against them were executed through the public tribunals.[1] As the civil officers were not skilled in matters of doctrine, the guilty must have escaped punishment by their ability to quibble and play with ecclesiastical words and phrases. This probably accounts for an edict of Arcadius which speaks of those who by slight arguments deviate from the standards of the Catholic religion.[2] The acceptance of an orthodox creed would therefore, according to a law of Honorius, quash all prosecution for heresy.[3]

[1] There is one edict which provides for special tribunals for heresy. It authorizes the pretorian prefect to appoint inquisitors, open a forum and receive reports of denunciators without the dishonor of delation. *C. Th.*, xvi, 5, 9. But there is no information regarding the execution of the edict. Its purpose was probably to intimidate.

[2] *C. Th.*, xvi, 5, 28. Haereticorum vocabulo continentur et latis adversus eos sanctionibus debent succumbere, qui vel levi argumento a iudicio catholicae religionis et tramite detecti fuerint deviare. Ideoque experientia tua Euresium haereticum nec in numero sanctissimorum antistitum habendum esse cognoscat (395).

[3] *C. Th.*, xvi, 5, 41. Licet crimina soleat poena purgare, nos tamen pravos hominum voluntates admonitione poenitentiae volumus emendare. Quicunque igitur haereticorum, sive Donatistae sint sive Manichaei vel cuiuscunque alterius pravae opinionis ac sectae, profanis ritibus aggregati catholicam fidem et ritum, quem per omnes homines cupimus observari, simplici confessione susceperint licet adeo inveteratum malum longa ac diuturna meditatione nutriverint, ut etiam legibus ante latis videnatur obnoxii: tamen hos, statim ut fuerint Deum simplici religione confessi, ab omni noxa absolvendos esse censemus, ut ad omnem reatum, seu ante contractus est, seu postea, quod volumus, contrahitur, etiamsi maxime reos poena vidatur urgere, sufficiat ad abolentionem, errorem propio damnavisse iudicio, et Dei omnipotentis nomen, inter ipsa quoque pericula requisitum, fuisse complexum, quia nusquam debet in misseriis invocatum religionis deesse subsidium. Ut igitur priores quos statuimus, leges in excidium sacrilegarum mentium omni exse cutionis argeri iubemus effectu, ita hos, qui simplicis fidem religionis, licet sera confessione, maluerint, censemus datis legibus non teneri.

Finally, the interference of the state in matters of faith was a problem to the church fathers of the third and fourth centuries. Tertullian, early in the third century, declared that it is "a fundamental human right, a privilege of nature, that every man should worship according to his own convictions; it is assuredly no part of religion forcibly to impose religion, to which free will and not force should lead us." [1] Lactantius, a contemporary of Constantine, also laid down the principle that "religion can not be imposed by force; if you wish to defend religion by bloodshed and by torture and by guilt, it will no longer be defended but will be polluted and profaned." [2] Chrysostom, living in a later period, when the alliance of church and state had further developed, approved the withdrawal of the right of assemblage from heretics and the confiscation of their property, but he also recommended that Christian love be shown them.[3] It was only gradually that Augustine, who moulded Christian thought in the west, was reconciled to enforced conformity to the Catholic faith. Long acquaintance with the Donatists, failure to convert them by argument, and the formulation of his theory of the Christian state led him, after the year 400, to decide that though it is "better that men should be brought to serve God by instruction than by fear or punishment," the latter means must not be neglected.[4]

Quae ideo sanximus quo universi cognoscant, nec profanis hominum studiis deesse vindictam et ad rectum redundare cultum, legum quoque adesse suffragium (407).

[1] *Ad Scap.*, 2; *cf. Apol.*, 24.

[2] *Div. Inst.*, v, 2; *cf.* Schaff, *Progress of Religious Freedom*, pp. 5, 6.

[3] Hom. xxix and xlvi in Matt.

[4] *Ep.* 185. In his *Con. Gaud. Don.*, i, 20, he advances the idea that if the state is not permitted to punish religious error, it cannot punish any other error, for religious error like secular crime proceeds from the evils of the flesh. *Cf. Ep.*, 123, for the evolution of his ideas on heresy.

The case frequently cited as typical of the conditions and opinions of the age regarding the treatment of heretics, is the execution of Priscillian and the persecution of his followers. In 384 Priscillian was condemned by the synod of Bordeaux for teachings tainted with Manichæism. He then appealed to Maximus, the usurping Augustus of the west. Martin of Tours and the better element of the Gallic church were alarmed, for to them it was sufficient "that condemned heretics be driven from the church by episcopal sentence," and it was "a new and unheard-of crime that the secular judge should hear a case of the church." They therefore advised Ithacus, the ecclesiastic pressing the case against Priscillian, to desist from prosecution in a secular court, and Maximus "to abstain from the shedding of blood." But their protest was without effect. Maximus appointed the Prefect Ennodius to conduct the trial and in a "twin judgment" Priscillian was found guilty of magic. After confirmation of the sentence by Maximus and a repetition of the procedure, Priscillian was put to death by the sword, and a number of his followers were executed or exiled.[1] The severity of the persecution as well as the violation of the law and custom that criminal charges against bishops should be examined by a synod before action by the civil authorities, made it repulsive to the more prominent ecclesiastics of the west. Ambrose, Martin of Tours and Pope Siricius expressed their disapproval and refused fellowship with Ithacus and his followers.

Not till the fifth century, when Germanic revolutions and invasions caused constant disorder and the administrative system was less efficient than ever, was the death penalty

[1] The source for the persecution of Priscillian is Sulpicius Severus, *Chronicon*, ii, 46, 5.

for heresy justified by ecclesiastical theory. Then Leo I, who secured imperial recognition of the authority of Rome over other churches of the west and anticipated the dogmatic arguments by which the papacy was later defended, approved the work of Maximus—indeed he "accepted as a duty the suppression of heresy and raised no objection to legislation which treated heresy as a crime against civil society, and declared it punishable with death." [1] The legislation of the emperors therefore furnished a precedent for later ages, rather than a condition of constant and active persecution, and the opinion of the leading ecclesiastics regarding secular intervention in matters of faith was clearly not unanimous.

When the church began to supplant paganism, and nonconformity to its standards of faith caused the ejection of guilty clerks from their churches and brought legal disabilities to the laity, ecclesiastical institutions naturally became a subject of legislation.

There is no better example of the strong influence which ecclesiastical ideas exercised at the imperial court than the edicts which forbid repetition of sacred baptism.[2] Since that sacrament was believed to purify the recipient from the guilt of previous sins, the Donatist theory of the inefficacy of sacraments administered by polluted hands was a vital problem in the life of the church. While Valentinian would not proscribe heretics, he declared in reply to a petition of Gallic bishops that "the priest who repeats the rite of baptism and, contrary to all canons, defiles that sacrament by repetition, is unworthy of the priesthood." [3] Gratian also condemned "the error of those who, despising the precepts of the apostles, abuse the Christian sacraments by rebaptiz-

[1] Chreighton, *Persecution and Tolerance*, pp. 76, 77.

[2] *C. Th.*, xvi, 6. [3] *C. Th.*, xvi, 6, 1.

ing" and ordered their churches to be delivered to the Catholics and their secret places of meeting to be confiscated to the fiscus.[1] In the same year that Honorius began his stringent legislation against the Donatists, he issued three edicts against the rebaptizers, while the first edicts of Theodosius the Younger on heresy were directed against the Novatians, the rebaptizers of the east.[2]

The extent to which clerical conceptions of life might infiltrate Roman culture is well illustrated by the legislation on celibacy. There was a strong feeling in the early church, largely Gnostic in origin, that the sexual relation involved sin, but marriage of the clergy was never forbidden in apostolic times. Some of the sects went so far as to reject the institution of marriage and by the fourth century it was generally held that the celibate life was superior to the marital. In recognition of this sentiment Constantine repealed the disabilities which the Roman law had imposed on the celibate and gave to minors who expressed the intention of remaining celibate permission to make testaments. Constantius denied to violators of sacred virgins any escape from the penalty of the law, while Jovian made any attempt to seize consecrated virgins or widows for the purpose of marriage, even with their consent, a capital offence, and withdrew from children of such a union their right of succession to parental property.[4]

The relation of celibacy to clerical orders was also a subject of legislation. In the west, the radical opinion regard-

[1] *C. Th.*, xvi, 2. [2] *Ibid.*, 3, 4, 5, 6, 7.

[3] *C. Th.*, viii, 16, 1. Soz., 1, 9. The law referred to was the *Lex Poppaea*, enacted by Augustus. Tacitus, *Annal.*, iii, 25.

[4] *C. Th.*, ix, 25, 1 (Constantius). The Roman law provided that if the violated woman should withdraw the accusation, the prosecution should end. Constantius made escape from the penalty, which was death, impossible. *Ibid.*, ix, 25, 2 (Jovian).

ing the sexual relation of the clergy was first expressed at the synod of Elvira in 306. There it was required that bishops, priests and all clerks should abstain from their wives and should not beget children. This rule, however, was not observed, and the marriage of clerks was recognized in the legislation of Constantius and Theodosius.[1] But in the later part of the fourth century the celibacy of the clergy was agitated by the papacy, and consequently African and Spanish councils required clerks who engaged in the administration of the sacraments to separate from their wives and forbade the promotion in orders of those who were fathers of children.[2] This legislation aroused much opposition. In Italy, Gaul and Spain many Christians held to the sanctity and purity of the marital relation and were consequently persecuted. Among them was Jovinian, who denied the value of the celibate life. He was scourged and driven from Rome, and his followers deported by Honorius in 412.[3] However, actual separation of husband and wife who had been married before ordination was not required, only abstinence from sexual intercourse. Consequently, many of the clergy at the time of ordination designated their wives as sisters and so continued to live with them. Abuse of this custom and the protection of existing marriages led Honorius in 420 to forbid clerks of all grades to associate with "foreign women" (namely, all except mothers, daughters and blood relatives), and to state that celibacy did not require the divorce of wives wedded

[1] *C. Th.*, xvi, 2, 9, 10, 11, 14; v, 3.

[2] *Con. Carth.*, II, 2; V, 3; *Con. Toledo* (400); Lea, *History of Sacerdotal Celibacy*, ch. v.

[3] *C. Th.*, xvi, 5, 53. Another edict of Honorius in 420, which punished with deportation any one who looks upon a sacred virgin as a violator, probably refers to the Jovinians. *Cf.* Godefroy, *C. Th.*, ix, 25, 3.

before entrance to the priesthood—a rule which, frequently cited by the councils, became the formal custom of the early middle ages.[1]

The political and social power acquired by the bishops, as well as the enforced conformity to standards of faith, made their election in the days of the later Roman Empire, as in the Middle Ages, a matter of public importance.

With the transition from the conception of the episcopacy as an administrative office to an institution ordained by God, the consent of neighboring bishops as well as the choice of the people became necessary for investiture with its rights and duties. Consequently the election of patriarchs was often the occasion of an ecclesiastical synod and the emperors, through their relation to synods, which they often convened and attended, might exercise a direct influence on elections. Constantine wrote to the council and people of Antioch not to choose Eusebius of Cæsarea bishop of that city.[2] Constantius convened "an assembly of bishops of Arian sentiment" and deposed Paul of Constantinople. It is also probable that he deposed other bishops by similar methods.[3] Valens ejected Eleusius, by an edict, and installed Eunomius as bishop of Cyzicus, and there are other instances of the Arian clergy securing investiture of their bishops through imperial favor during his reign.[4]

In the west Valentinian I instituted a new policy. Visiting Milan in 374 he found a synod assembled to elect a successor to Auxentius, the deceased bishop of the city. The synod asked him "by his wisdom and piety" to choose a

[1] *C. Th.*, xvi, 2, 44. The first part of this edict is similar to the third canon of Nicea. The latter part is the rule of the Roman church as stated by Leo I, *Ep.*, clxvii, in. 3; Löning, *Gesch. des deutschen Kirchenrechts.*, vol. i, p. 181.

[2] Euseb., *Vita*, 60, 62.

[3] Soc., ii, 7; Soz., iii, 4; iv, 27.

[4] Soc., iv, 7, 15; Soz., vi, 13, 14; Theod., iv, 15.

new bishop. He replied, "That is an affair beyond my strength. You, who are ordained with divine grace and are illumined by its splendor, can decide better than I." The result was the election of Ambrose, a catechumen and a secular official, who formulated the clerical theory of the immunity of the church from any secular control.[1] This policy of non-intervention in ecclesiastical affairs was continued by Gratian, and Honorius, in deciding the contest of Eulalius and Boniface for the bishopric of Rome, made it definitely the policy of the state in disputed elections.

When Pope Zosimus died in 418, the efforts to choose a successor resulted in a double election. Honorius, influenced by the report of the city prefect, believed that Eulalius was canonically elected and therefore banished Boniface. But the friends of the defeated candidate appealed to the emperor in his behalf and Honorius ordered his case to be re-opened at a synod to be held at Rome. When the synod failed to make a decision, Honorius ordered another hearing at Spoleto and forbade either of the rival candidates to return to Rome in the meantime. Eulalius disregarded this order and Honorius promptly banished him and declared Boniface the legitimate Bishop of Rome. To provide for similar cases in the future, Honorius now issued an edict which declared that neither candidate of a double election should be installed in office, but that one "should remain in the apostolic seat whom the divine judgment and universal consent shall choose in a new election." [2]

[1] Theod., iv, 5, 6; Soc., iv, 30. The account of Socrates clearly shows that it was customary for the emperor to influence elections. Theodoret adds that the baptism and ordination were by order of the emperor. This and the fact that Ambrose was a civil officer are responsible for the popular opinion that imperial influence caused his election.

[2] Haenel, *Corpus Legum*, p. 239; Langen, *Gesch. der römischen Kirche*, vol. i, p. 763.

In the east, imperial participation in elections continued. Arcadius, with the consent of the people and clergy, called Chrysostom to the seat of Constantinople.[1] After the death of Sisinnius none of the candidates found favor with Theodosius the Younger and he caused Nectorius of Antioch to be invested with the patriarchate.[2] Under Marcian and Leo elections were free, but Zeno and Justin again made the episcopacy a part of their political patronage, while Justinian's legislation is notable for the absence of any prohibition of political influence in elections.[3] The result of these conditions was the formation of an intimate relation between church and state in the east. The church became subservient to the state, to whose interests its ideals and work were deemed vital; while the independence of the church from temporal control became the working theory in the west—conditions of much significance in the separation of the eastern and western churches.

The relation of the Bishop of Rome to the other ecclesiastical authorities in the west was also a subject of civil legislation which, like that on elections, was not incorporated in the Theodosian code.

The participation and leadership of the Papacy in ecclesiastical affairs during the fourth century, and the attitude of the church toward the Roman See are obscure and indefinite. The Council of Nicea designated Rome as a patriarchate, but it did not state the extent of the jurisdiction of the

[1] Soc., vi, 2.

[2] Soc., vii, 30; *cf.* 39. Nicephorus, xiv, 47.

[3] Nov., lxxiii, c. 1; cxxviii, c. 2. For elections in which Justinian exercised an influence, *cf.* Staudenmeier, *Gesch. der Bischofswahlen*, p. 46. This continual interference of the eastern emperors in episcopal elections explains the omission of the edict of Honorius from the Theodosian code.

Roman over other churches.[1] Eighteen years later the council of Sardica declared that a bishop deposed by a provincial synod might appeal to the Bishop of Rome, who should then convene a new synod to investigate his case. But no means for enforcing the decision of the synod or for reinstating the deposed bishop were prescribed; moreover, Sardica did not represent the opinion of the entire church, and as Constantius was hostile to the Athanasian clergy, its canons were not observed.[2] However, late in the century, when the Athanasian party had acquired abiding influence at the imperial court, Gratian defined the authority of the Bishop of Rome among the churches in terms very similar to the legislation of Sardica.

The condition that gave rise to this definition of power was the double election of Damasus and Ursinus to the See of Rome which soon extended from an ecclesiastical quarrel to an armed conflict in which blood was shed. The civil authorities called the clerks to account for their disturbance of the peace, but Valentinian I issued an edict, often cited by ecclesiastical authorities, that clerks should be heard only by clerks in matters of faith.[3] Yet the emperor, in response to petitions of Damasus and his party, twice banished Ursinus. That unfortunate prelate had, however, such a strong following in Rome and southern Italy that when Gratian became sole administrator of the west in 375, the emperor deemed it necessary to renew the ban against him, and five years later he confirmed the election of Damasus in an edict which was probably issued at the instance of a Roman

[1] *Can. Nicea*, 6. Rufinus, *H. E.*, i ,make the jurisdiction of Rome extend over the Suburbicarian provinces. This was the territory presided over by the *prefectus urbi*. but the jurisdiction of the Pope probably included more than this. *Cf.* Hefele, *Concilien Geschichte*, vol. i, p. 388; Löning, *Gesch. des deutschen Kirchenrechts*, vol. i, p. 436.

[2] *C. Sardica*, can. 3, 4, 5.

[3] Ambrose, *Ep.*, xxi, 2.

synod. It declared that the sentence against one who "unjustly wishes to retain his church" after being "condemned by the judgment of Damasus, given with the advice of five or seven bishops," shall be enforced by the civil authorities; and that in future all disturbances in the churches of distant parts shall be decided by the metropolitan, or, if the metropolitan himself is concerned, the case shall go to Rome "or before him whom the Roman bishop shall indicate as judge;" and that if any priest or metropolitan is suspended unjustly, he may appeal to the Roman bishop or a council of fifteen neighboring bishops.[1] Two years later Theodosius, as we have seen, urged upon his subjects the acceptance of the faith professed by Rome; while the council of Constantinople in 381 gave the Bishop of Rome precedence over all other bishops.

A final and more definite statement of the authority of the Papacy was made in the fifth century by Valentinian III. Its purpose was to settle the rivalry of Arles and Rome for the ecclesiastical leadership of the west, a rivalry which was closely related to the political conditions of the age.

The military rebellions and depredations of the Germans in Gaul during the later fourth and early fifth centuries were a menace to the ecclesiastical as well as the civil administration. Therefore the Gallic clergy sought to form more intimate relations with Rome, and Innocent I took advantage of this situation to claim for the See of Rome the highest judicial authority in the church. But in the reorganization of the Gallic provinces after the overthrow of Constantine

[1] Mansi, iii, 627. It is sometimes claimed that the edict of Valentinian extended the jurisdiction of the Bishop of Rome. This is hardly true. He simply gave the church authorities the right to decide ecclesiastical cases, while Gratian added the enforcement of ecclesiastical decisions by the secular authorities. The present edict concerning the Bishop of Rome was not observed in the church.

the Usurper in 411, Constantius, Master of Horse under Honorius, attempted to make Arles the centre of ecclesiastical as well as of political administration. In this plan he was supported, doubtless for political reasons, by Pope Zosimus, who informed the Gallic clergy that the Bishop of Arles had the exclusive right to ordain bishops in the provinces of Vienne and Narbonne I and II, and supported Patroclus of Arles in establishing his authority over the Bishop of Marseilles.[1] But after the death of Constantine there was a change in the attitude of the papacy toward the leadership of Arles. Boniface I lent a willing ear to the appeal of the clerks of Luteva who questioned the legality of the ordination of their bishop by Patroclus; and Coelestinus applied to conditions in Gaul the rule of Nicea, that each metropolitan should be content with his own province.[2]

The decisive period of this rivalry between Rome and Arles was in the pontificate of Leo I. The political disorder which followed the capture of Toulouse by the Visigoths in 419 and the constant menace of the Franks and Burgundians on the northern frontier of Gaul resulted in ecclesiastical as well as political confusion. The unity of the Gallic church, which represented social as well as religious interests, was threatened. Hilary, bishop of Arles, therefore resorted to extreme measures to realize Patroclus's ideal of an independent, unified Gallic church under the leadership of Arles. He held synods, ordained and deposed bishops of other provinces than his own, and was probably assisted by the civil authorities.[3] In 444 he caused the deposition of Celidonius, bishop of Besançon, on charges of

[1] Zos., *Ep.*, i. *Cf. Constitutiones Sirmondi*, vi, in which Valentinian III recognizes the authority of Arles. (Haenel, *Corpus Juris Ante-Justinianae*, vol. iii.)

[2] Bon., *Ep.*, xii; Colest., *Ep.*, iv; Löning, *op. cit.*, vol. i, p. 472.

[3] *Nov. Val.*, iii, 16.

marrying a widow and of rendering a sentence of death before his ordination to the episcopacy. Celidonius appealed to Leo. Witnesses were found who testified that the charges were false, and a Roman synod convoked by Leo declared Celidonius innocent and restored to him his episcopal rights and honors.

This is the first instance of the bishop of Rome exercising disciplinary authority over another metropolitan. The right to appeal through him to a synod had been granted at Sardica, but not the authority to enforce the synod's decision. Knowing that the claims of Arles had had the support of the civil power in Gaul, Leo forestalled any actions thereby in behalf of Hilary by securing an imperial confirmation of the authority he had assumed. In an edict Valentinian recognized the Bishop of Rome as the primate of the church, declared Hilary's investiture of bishops an offence "against the majesty of the empire and the honor of the apostolic see," forbade any deviation from ecclesiastical custom without "the authority of the venerable Pope of the Eternal City," and ordered the secular officials to enforce, if necessary, the obedience of bishops to a citation to "the court of the Roman bishop." [1]

Thus, as the empire declined, the autonomy of the church, its independence from secular control and the leadership of the Bishop of Rome as its supreme head and authority were recognized in the jurisprudence of the west. The significance of this policy, the sanction by the empire of a social and political force which was to supplant it in the direction of human destinies, is more fully realized by a consideration of the purely secular phases of the ecclesiastical legislation preserved in the code of Theodosius.

[1] *Nov. Val.*, iii, 16. The conditions and events in Gaul during the period of the controversy of Rome and Arles are obscure. I have followed Löning, *G. d. d. K.*, vol. i, pp. 463-499.

## CHAPTER IV

### The Relation of the Church to the Social Organization of the Empire

The relation of the church to the economic and social structure of society has long been a problem of practical as well as speculative interest. The exemption of its property from taxation and its corporate privileges, the immunity of its officials from services to the state, the claim of its courts to exclusive jurisdiction over the litigation of all its servants—these problems of mediæval and modern government have their origin in the generosity of the Roman emperors. Indeed, their liberality speedily resulted in unforeseen perplexities with which legislation was not able to cope.

In the fourth century Roman economic and administrative development reached a crisis. Political centralization, the establishment of a system of public works, the maintenance of a great army and the extravagance of the emperors had increased the amount and variety of taxation to such an extent that, by the opening of the fourth century, the farmers, in many places, could not afford to till the soil, nor the artisans to continue their industries. There were two possible remedies for the situation: a radical change in the existing administrative policy or the maintenance of existing conditions through central control and governmental guidance of individual activity. The latter course was adopted by Diocletian and Constantine. Their solution of the economic problem was to force the individual, who could

no longer work for his own advantage, to work for that of the state. They therefore assumed control of industries and prevented the amelioration of the fortune of the citizen by making professions hereditary. The soldiers in the army, the workmen in the mines, the *coloni* on the plantations, as well as the higher classes, were bound to their positions in life, and their sons inherited their duties and obligations.[1]

The caste-like organization which society was gradually assuming is well illustrated by the fate of the *curiales*. Originally they were members of the municipal senates composed mainly of those who had held offices; but with the centralization of government and the increasing need for revenue their ranks were recruited through appointments made by the imperial officials, and finally Constantius, in 342, made the curial order include all land-holders of fifty acres.[2]

The significance of this legislation is realized when the obligations of the *curiales* are examined. In addition to taxes on property and the responsibilities of local administration, they were burdened by obligations to the central government. These were the *munera*, or liability for services on the roads and public works, *etc.*; the duty of apportioning and collecting the taxes levied by the imperial fiscus, and the responsibility for all deficiencies in the revenue which they were required to collect. Therefore, the duties of the *curiales* were made hereditary, from which escape was only possible after an individual had gone through the routine of all official duties to which his membership in the curial class might make him liable. Then he might enter the new senatorial order created by the

[1] There is an excellent summary of these conditions by Wm. A. Brown in *The Political Science Quarterly*, vol. ii, no. 3, under the title, "State Control of Industry in the Fourth Century."

[2] Marquardt, *Römische Staatsverwaltung*, vol. i, p. 190. *C. Th.*, xiii, 1, 33.

emperors, in which he was exempt from municipal burdens, from torture and from service on the public works, but he was still subject to the land-tax, gifts on certain anniversaries, and, if appointed to offices, to expenses for public games.

In this society where the individual was oppressed with ever-increasing obligations to the state, there were privileged classes. Teachers, rhetoricians, priests and physicians were granted immunity from personal burdens (*munera*) by various emperors because their services were regarded as contributions to the public welfare.[1] To these privileged classes Constantine added the Christian clergy. In a letter to Anulinus, Proconsul of Africa, he directed that those who give their services to the worship of the divine religion, and who are commonly called clergymen, be entirely exempt from all public duties (*omnibus omnino publicis functionibus*) in order that they may not by any error or sacrilegious negligence be drawn away from the service of the Deity, but may devote themselves without any hindrance to their own law.[2] These privileges were extended to the entire clergy in 319, but heretics were excluded from enjoying them in 326. In 330 readers and subdeacons who had suffered at the hands of the heretics were included in the exempted class.[3]

[1] Kuhn, *Die städtische und bürgerliche Verfassung des röm. Reiches*, pp. 183, 106.

[2] Euseb., *H. E.*, x, 7.

[3] *C. Th.*, xvi, 2, 2. Qui divino cultui ministeria religionis impendunt, id est hi, qui clerici appelantur, ab omnibus omnino muneribus excusentur, ne sacrilegio livore quorundam a divinis obsequiis avocentur (319). *Ibid.*, 5, 1. Privilegia, quae contemplatione religionis indulta sunt, catholicae tantum legis observatoribus prodesse oportet. Haereticos autem atque schismaticos non solum ab his privilegiis alienos esse volumus sed etiam diversis muneribus constringi et subiici (326). *Ibid.*, 7.

This immunity from the economic obligations of citizenship was extended to the property of clerks by Constantius, who excused it from liability to new collations, extraordinary superindictions, the imposts on trade and industry, contributions for the support of the army, public works, and all the responsibilities of curial property.[1] Indeed, not only clerks, but their wives and children were likewise relieved from curial obligations, showing that the tendency in the new fortunes of the church was to make the privileges of the clergy, like those of other professions, hereditary.[2]

The Arian party, always in a minority in the west, naturally had no sympathy for the immunities from which its opponents derived all the benefit. This perhaps explains Constantius's revival of Constantine's legislation in 354, providing that only those clerks who had no possessions should be exempt from curial obligations.[3] A little later the acceptance of an Arian creed was forced on the synod of Milan, while the Arians of Rome expelled Pope Liberius from the city and elected an anti-pope. But the people were not in sympathy with the movement and in 357 Liberius was recalled. The abrogated ecclesiastical privileges were then restored to the church of Rome and three years later, in reply to a petition of the council of Ariminum, they were renewed in the interest of the entire church.[4] The legislation authorizing them, like the other ecclesiastical laws of Constantine and Constantius, was rescinded by Julian, but it was revived by Valentinian, and its exemptions were extended to the lower orders by Gratian.[5]

[1] *C. Th.*, xvi, 8, 9, 10. There is no mention of the exemption from the capitation tax levied on property as well as persons.

[2] *C. Th.*, xvi, 2, 9. "Filios tamen eorum, si curiis obnixii non tenentur, in ecclesia perseverare. *Cf.* 10. Quod et conjugibus et liberis eorum et ministeriis, maribus pariter ac feminis, indulgemus, quos a censibus etiam iubemus perseverare immunes."

[3] *C. Th.*, xvi, 2, 11. [4] *Ibid.*, 2, 13, 14, 15. [5] *Ibid.*, 15, 18, 24.

As soon as these privileges were granted, two problems arose which necessitated restrictive measures. First, the expansion of church membership increased the number of the clergy, over whose choice the emperor exercised no control. Accordingly the state was deprived of the services of a large and increasing class of citizens whose immunities tended to become hereditary. On the other hand, many *curiales* sought refuge from their economic burdens by entering the ecclesiastical orders.

Therefore, Constantine, in 320, forbade *curiales* or those able to perform the duties of *curiales* to enter the service of the church, the context of the edict implying that there had been similar legislation previously;[1] and another law of the same character was enacted six years later.[2] In explanation of these restrictions of clerical privileges Constantine stated the relation which the church should sustain to secular society in the following sentences: "Those should be chosen to the places of deceased clerks who are poor in fortune and may not be held subject to civil obligations." "The rich ought to bear the burdens of the world, the poor ought to be supported by the riches of the church."

These restrictions were not observed nor was Constantine's idea of the social service of the church realized. The church was more than a benevolent institution, and its offices were something more than a livelihood for those poor in worldly goods. *Curiales* continued to find their way into clerical orders, and so escaped their economic responsibilities. Constantius therefore subjected clerical property to

[1] *C. Th.*, xvi, 2, 3. Note the opening words: "Cum constituto emissa præcipiat."

[2] *C. Th.*, xvi, 2, 6.

the regular taxes, restored the property of *curiales* who had become clerks to curial obligations and required the owners tered ecclesiastical service with the consent of their fellow *curiales*.[1] Valentinian I also required *curiales* who had taken orders during his reign to resume their public obligations and forbade "rich plebeians to be received by the church."[2] Violations of the expressed policy of the state continued, but through the influence of Ambrose Theodosius pardoned those guilty prior to 388, while the property of later offenders was confiscated to the fiscus.[3] In 399 Arcadius required all *curiales* who had risen to the rank of bishop, presbyter, or deacon since 388 to furnish a substitute to their curia or to relinquish their property; and those in the minor orders were to be immediately subject to their obligation to the state.[4] A similar edict was issued by Theodosius the Younger, while Valentinian III forbade *curiales* to take orders on any conditions, and also established the rule that no one whose property exceeded 300 solidi should enter ecclesiastical service. The archdeacon was charged by Majorian to correct all violations of this law.[5]

The relation of the clergy to the mercantile profession was also a subject of legislation. Because "it is evident that the profits they make in their shops and places of business will be given to the poor," Constantius exempted

[1] *C. Th.*, xvi, 2, 15; viii, 4, 7; xii, 1, 49.

[2] *Ibid.*, xvi, 2, 17, 19, 21, 22.

[3] *Ibid.*, xii, 1, 121.

[4] *C. Th.*, xii, 1, 163. Deposed clerks were also forced to assume curial obligations, but they were not permitted to serve in any civil or military office. xvi, 2, 39.

[5] *Ibid.*, xii, 1, 172; *Nov. Val.*, iii, 3.

clerks from taxes on trade.[1] But his idea of the altruistic character of the clergy changed in his later years, and he limited the exemption to occupations whose only object was to supply the necessities of life.[2] In the readjustment of ecclesiastical affairs after the death of Julian, this exemption was not revived by Valens in the east, but Gratian granted it in the west in case of transactions not exceeding 10 solidi.[3] Under Honorius the privilege was revived, but finally Valentinian III revoked all immunity from taxation in the case of clerks engaging in trade.[4]

In conferring on the clergy immunity from civic obligations Constantine and Constantius evidently produced conditions which legislation could not control. But this was not the result of any direct opposition by the church to the policy of the state. Indeed, the relation of the clergy to the social orders presented an ecclesiastical as well as a political problem. The immunities of the profession led many to enter its service for worldly and unconsecrated purposes. Consequently Pope Leo I saw in Valentinian III's prohibition of *curiales* entering the priesthood a protection to the church. He consequently advised that *curiales* who had taken orders to avoid their civil obligations should be deposed, and that those engaging in military service after bap-

[1] *Ibid.*, xvi, 2, 14. "Et cum negotiatores ad aliquem praestationem competentem vacantur, ab his universis istius modi strepitus conquiescat; si quid enim vel parcimonia vel provisione vel mercatura, honestati tamen conscia, congesserint, in usum pauperum atque egentium ministrari oportet, aut id, quod ex eorundum ergasteriis vel tabernis conquiri potuerit et colligi, collectum id religionis aestiment lucrum."

[2] *C. Th.*, xvi, 2, 15.

[3] *Ibid.*, xiii, 1, 5, 6, 11. Valens had a similar conception of the service of the church to that of Constantine and Constantius. "Christianos quibus si verus est cultus adiuvare pauperes et positos in necessitatibus volunt." (5)

[4] *Ibid.*, xvi, 2, 36; *Nov. Val.*, xxxiv, 4.

tism should not be admitted to orders.[1] The fourth council of Toledo excluded from the episcopacy those "bound to the obligations of a curia," who have not risen from the lower orders or are under thirty years of age. These rules of the fifth century were in the twelfth century incorporated in the *Decretum* by Gratian as precedents for later ages.

The attitude of the church toward clerical industries also coincided with that of the state. In the first and second centuries, while the church was an obscure and unpopular institution, its officials depended on their individual labor or some secular profession for a livelihood, but with the increase of membership and wealth in the third century, a feeling arose against the combination of spiritual and worldly professions. It was not prompted by a belief in the unworthiness of secular pursuits, but by a conviction that the spiritual duties of the priesthood were sufficient to demand all the time of the clergy.[2] In the fourth century the synod of Elvira forbade bishops, priests and deacons to leave their province for purposes of trade; a Donatist council at Carthage forbade clerks to engage in any secular occupation, while Jerome and Augustine complained that the spiritual duties of the clergy suffered on account of secular pursuits.[3] The exemption of clerks from taxes on

[1] *Decretum*, pars i, dist. 51; *cf.* Ivo Chart, *Decret.*, iv, 349. A similar comparison might be made of the attitude of church and state toward the entrance of slaves into clerical service. The apostolical canons require that no one not his own master should become a clerk (c. 82). Leo I forbade the ordination of slaves without their masters' consent (*D. dist.*, 54, c. 1). Valentinian III forbade the ordination of tenants, slaves and *coloni*. But if a member of these classes should become a clerk and remain in orders thirty years or rise to the episcopacy, his master could not seize him, but he might claim his *peculium*. *Nov. Val.*, iii; xxiv, 3. *Cf. D. dist.*, 54, cc. 6-9.

[2] The sources of this sentiment were Cyprian and Tertullian.

[3] Elvira (306), c. 19; Carthage (348); Jerome, *Ep.*, 52, c. 5; Aug., *Sermo*, 85.

trade was therefore made in consideration of the custom and conditions of the early centuries of the church, and its removal was in accord with the better sentiment of the age.

While the exemption of clerks from personal burdens and liability to certain forms of taxation and the withdrawal of similar privileges from the pagan priesthood by Gratian made the clergy a privileged class in a society notable for the number and variety of its economic obligations, the institution they served received a similarly distinctive character by the recognition of its right as a corporation to receive donations and testamentary bequests.

The recognition of the corporate rights of the church antedates the reign of Constantine, a fact often neglected in forming an opinion of the material fortunes of the church in the age of its persecution. The litigation of the Christians of Rome with the corporation of inn-keepers, the decision in their favor by Aurelian, and his award of property claimed by Paul of Samosata "to those who are in communion with the bishops of Italy and the Bishop of Rome," as well as Valerian's confiscation of ecclesiastical property and its restoration by Galerius, clearly show that the property rights of individual churches were recognized in the third century.[1] After the persecution of Diocletian Maxentius authorized Pope Miltiades to reclaim the property of the church confiscated since 304 and Licinius granted the same privilege "to the corporation of Christians" in the east. These facts are evidences of the legal recognition of corporate privileges in the fourth century previous to the legislation in the Theodosian code.[2]

The character of these corporate rights is not definitely

[1] Lampridius, *Alex. Sev.*, 49; Euseb., *H. E.*, vii, 30, 19. *Ibid.*, vii, 13.

[2] August, *Brev. Coll. cum Donat.*, iii, 34; Lactantius, *De Mortibus Persecutorum*, 48.

known, but some appreciation of them may be formed by considering the nature of Roman corporations and making a comparison with ecclesiastical conditions.

The right of organizing societies and corporations was unrestricted under the Republic. On account of the activity of political clubs in the civil wars, Augustus, by the Lex Julia, dissolved all *collegia* except the ancient industrial guilds which tradition associated with Numa Pompilius, and prohibited new corporations to be formed without the consent of the emperor. These privileged *collegia* were of two classes, *collegia tenuiorum,* societies formed for purposes of charity and mutual aid, principally by the workingmen, and *collegia sodalitatum,* which combined with benevolent aims social pleasures. The enforcement of the Lex Julia varied according to the policy of each emperor. Thus Trajan was active in the suppression of illegal corporations, Hadrian made an exception in favor of charitable societies at Rome, and Septimius Severus extended this privilege to the provinces. Marcus Aurelius granted licensed *collegia* the rights of juristic persons and Alexander Severus gave them the right of representation by a *defensor.* They were thus brought under the control of the Roman administrative system and the greater toleration so gained is indicated by the fact that, with the reign of Alexander the words *coire licet* are no longer found in the inscription of the *Collegia.*

Since there is no account of the confiscation of ecclesiastical property previous to the persecution of 257, it is probable that the churches preserved their corporate possessions and legal interests as *collegia,* either as *collegia tenuiorum* or as simple religious societies, which societies were generally tolerated.[2] The inscription that records the gift of

[1] *Cf.* Liebenam, *Zur Geschichte und Organisation des röm. Vereinswesen.*

[2] *Dig.,* xlvii, 22, 1.

a cemetery to the church of Cæsarea is similar to the form by which burial land or places of assembly were given to *collegia;* and there are reasons to believe that Christian congregations were publicly and legally known under such vague terms as *cultores verbi,* or *ecclesia fratrum,* quite in keeping with the names of many *collegia tenuiorum.*[1] Tertullian wrote his apology during the reign of Septimius who was friendly to the *collegia* and this explains the language with which he describes the Christian communities and pleads for their toleration. The Christians make contributions (*stipem*) to their treasury (*arcem*) each month (*menstrua die*), and they should receive a "place among the legally tolerated societies" for, when "the virtuous meet together, when the pious, the pure-minded assemble in congregation, they should be called not a faction but a *curia.*"[2] Some years after Tertullian wrote, the jurist Ulpian made membership in an illicit *collegium* equivalent to *crimen majestatis;* and a similar popular conception of Christianity may explain the charge of sacrilege and treason from which Tertullian defended the Christians.[3] Moreover, that the names of the bishops of Rome were inscribed on the registers of the city prefect, and that the names of provincial bishops were also probably preserved on the registers of

[1] *Corpus Inscriptionum Latinarum,* viii, 9585; De Rossi, *Roma Sotteranea,* vol. i, p. 107. Pagan *collegia* were known as *cultores Jovis, Herculis, etc.*

[2] The words *stipem, arcem, menstrua,* are also found in the inscriptions of the *collegia.* Orelli-Henzen, *Collectio Inscriptionum Latinarum,* 6086. *Curia* in the African dialect corresponds to *collegium* in that of Rome.

[3] *Dig.,* xlvii, 22, 2. *Cf.* xlviii, 4, 1. The charge of sacrilege was a popular one. Legally it was injury to sacral property, but the Christians were never found guilty of such an offense. This popular conception of sacrilege found its way into the code as injury to property of the Christian church. *C. Th.,* xvi, 2, 25, 31.

provincial governors, as well as the fact that the property rights of the church were recognized by various emperors, are best explained by the existence of Christian churches as licensed corporations.[1] This does not signify a legal recognition of Christianity, for the name Christian would not be taken by the *collegia,* nor does it mean that the character of Christian institutions was in any way modified by pagan foundations; but under some such fictitious title as those mentioned above, the churches might secure the right of assemblage and of holding property and thus ecclesiastical organization might survive the severe persecution of the second and third centuries.[2]

Under Constantine the privileges enjoyed by the churches as private *collegia* or, temporarily, as public foundations under Diocletian and Licinius were succeeded by similar privileges as legalized religious corporations. To Roman citizens the right was given to leave at death to "any of the most sacred and venerable Catholic churches" whatever they desired.[3] By this edict the church received a far more extensive privilege than any of the religious founda-

[1] Vigneaux, *Essai sur l'histoire de la préfecture urbis,* p. 140. De Rossi, *Roma Sotteranea,* vol. ii, pp. vi, ix.

[2] De Rossi holds that the churches adopted the organization of the *collegia tenuiorum* exclusively. He has been criticised by Duchesne, *Les Origines chrétiennes.* Waltzung holds that the churches were religious corporations which were not licensed but were allowed to exist. (*Les Corporations de l'ancienne Rome et la charita.*) *Cf.* the work of Liebenam already mentioned.

[3] *C. Th.,* xvi, 2, 4. Habeat unusquisque licentiam, sanctissimo catholicae venerabilique concilio decadens bonorum quod optavit, relinquere. Non sint causa indicia, *etc. Concilio* refers to an individual place, not an institution. Thus, Symmachus speaks of the *concilium patrum* for the senate and Tertullian uses the word for a temple. That Constantine did not recognize one universal church is evident from the interchangeable uses of the words *ecclesia* and *ecclesiae. Cf.* xvi, 2, 34, 38. His desire to exclude the heretical churches from the privilege of the law is probably responsible for its wording.

tions of paganism. These could only receive gifts or alienate property by consent of the people and with special ceremonies; and, with a few exceptions, never acquired the right to accept testamentary benefactions. As a justification of this extraordinary privilege it was stated that "nothing should be dearer to men than that the writing of their last wish, after which they will not be able to write again, should be unrestricted and their will, which may not return again, should have free play." [1]

This privilege, like the immunities of the clergy, was subject to abuse and corruption. The age was one of religious enthusiasm and generosity, which were encouraged by the teaching of the churchmen. Augustine urged Christians to remember Christ as well as their sons in their last bequests. Parents often gave all their property to the church, leaving their children in want and hunger, and Jerome presents a sad picture of the clergy of Rome visiting the houses of rich matrons to solicit gifts.[2] Valentinian, therefore, ordered the confiscation of gifts and legacies of widows and minors that had been solicited by priests and monks.[3] Twenty years later Theodosius forbade the appropriation of the property of a widow or deaconess to religious purposes or the execution of their legacies to that effect, reserving

[1] The church was also given the right of being represented in the courts by an advocate, or civil representative, instead of an ecclesiastic, for which privilege the similar right of pagan foundations was the precedent. *Cf. C. Th.*, xvi, 2, 38 (of Honorius), and Godefroy's comment.

[2] Aug., *Sermo*, 355, c. 4; *Ep.*, 262; Jerome, *Ep.*, 52. The law of the Falcidian Fourth protected the legal heirs from complete disinheritance. But the Sentences of Paul allow this rule to be applied only after gifts to the gods have been deducted. It is probable that a similar custom was observed in the case of testaments of the church. *Cf. Lex Romana Visigothorum* (ch. vi of this monograph).

[3] *C. Th.*, xvi, 2, 20.

their property to the heirs, relatives and creditors.[1] But ecclesiastical influences were strong enough to secure the repeal of the law two months after its enactment and Theodosius the Younger allowed the church to inherit the property of clerks who died without testament or heirs.[2] Finally, Martian permitted widows, deaconesses and nuns to leave by testament, *fidei commissa,* or codicil, whatever they pleased to churches, bishops, clerks or deaconesses.[3]

The recognition of the corporate rights of the church suggests the problem of the taxation of its property. While no legislation by Constantine on this subject remains, his association of the churches with the imperial patrimony suggests that church property in some instances enjoyed similar privileges.[4] The synod of Rimini petitioned Constantine for the exemption of church property from taxation but the request was not granted.[5] Still, church property enjoyed some economic privilege, doubtless through its association with clerical property, for Gratian declared it to be subject to extraordinary taxes but exempt "by ancient custom" from obligations to furnish food and means of transporta-

[1] *C. Th.*, 2, 27. This edict also fixes the age of deaconesses at sixty years and prohibits women to tonsure their heads.

[2] *Ibid.*, xvi, 2, 28; v, 3, 1.

[3] Nov. Mart., v.

[4] *C. Th.*, 1, 1. This edict states that, with the exception of private properties, the Catholic churches and the families of the ex-consul and Master of Horse Eusebius and Assacus, king of Armenia, no one shall be aided by emoluments of houses and sustenance. Interpretations of the edict differ. Godefroy saw in it exemption of church property from taxation. But as neither Eusebius nor any of the ecclesiastical historians mentions such a privilege, this cannot be its meaning. Löning suggests that it probably refers to gifts of grain and provisions. *Cf.* Theodoret, *H. E.*, i, 10; Euseb., x, 6. Taxes on church property might have been occasionally remitted in case of need, but there is no legal exemption by Constantine.

[5] *C. Th.*, xvi, 2, 15.

tion for the palace and army, grain for distribution in the cities, service on public buildings, wood and fuel for the imperial factories and other *munera*.[1] Honorius extended the exemption to service on roads, the repair of bridges, and extraordinary superindictions.[2] This exemption of a vast and increasing property from so many obligations resulted in a serious decline of public revenues; hence Theodosius the Younger imposed on the church the care of bridges, roads and streets, while Valentinian III removed all exemptions from public burdens.[3]

When the privileges conferred on the church and clergy are considered in relation to the social problems of the age, they leave the impression that they increased the disintegrating forces in Roman society. The one hundred and ninety edicts of the code which treat of the *curiales* give a vivid picture of the decline of the middle class. On the other hand, the senatorial order was increasing in wealth, and the cumbersome administrative machinery was too corrupt for any legislation to purify. Salvian, the garrulous priest of Marseilles, the only writer of the fifth century interested in the economic and social problems of his time, describes the feeling aroused by legislation. According to him the poor pay tribute to the rich, the weak bear the burden of the strong. Two or three determine what may bring injury to all, a few mighty ones make decisions which bring misery to the multitude. The people, united by tradition and the associations of a common fatherland, are alienated in sympathies. One can not be happy without bringing unhappiness to his neighbor, the individual's interests absorb all consideration for his fellowman. Yet his solution for the evils he saw was not a renewed patriotism,

[1] *C. Th.*, xi, 16, 15.

[2] *Ibid.*, xvi, 2, 40.

[3] *Ibid.*, xv, 3, 3; *Nov. Val.*, x.

but a greater love and generosity for the institution he served.[1] The church, therefore, by laying stress on the distinction between clergy and laity, by securing privileges which exempted its officials and property from the common fortune of the people it professed to serve, must have increased the confusion of interests which already existed. This conjecture is confirmed by an examination of the participation of the episcopacy in the administration of justice and the attitude of the clergy toward the jurisdiction of the civil courts.

[1] *Cf.* Salvianus, *De Gubernatione Dei*, Liber iii, for his criticisms of social conditions. For his solution, *cf. Adversum Avaritiam.* There he finds the root of all evil in that spirit of avarice which withholds from God and the church the wealth that should be devoted to religious and charitable purposes.

## CHAPTER V

### The Episcopal Courts

The imperial administration rendered a distinct and abiding service to Roman civilization by its influence on the evolution of law. It unified the custom of city and province, eliminated the antithesis between the rules of civil and official law, and infused a new spirit of humanity into the legal life of the empire by subjecting it to the guidance of one supreme authority.

But these beneficent results of the centralization of justice were not attained without incurring certain evils and abuses. Chief of these were technicalities of procedure and delay in justice incidental to the centralizing process and the formation of a system of appeals. Salvian regards the failure to obtain justice in the courts as one of the causes leading the unfortunate to leave their country and to seek homes among the barbarians.[1] Ammianus Marcelinus describes the lawyers as people

who promote every variety of strife and contention in thousands of actions, wear the door-posts of widows and the thresholds of orphans, create bitter hatred among friends, relatives or connections who have a disagreement, mystify the

[1] *De Gubernatione Dei*, v, 5. Priscus, a Greek historian of the fifth century, found a Greek captive among the Scythians "who considered his new life . . . better than his old life among the Romans." One reason for this was the corrupt condition of the courts; another the inequality in taxation among the Romans. Cited by Bury, *Later Roman Empire*, vol. i, p. 28.

truth, prepare seven costly methods of introducing some well known law,

and conclude their argument by declaring that "the chief advocates have as yet had only three years since the commencement of the suit to prepare themselves to conduct it," and so obtain an adjournment.[1] Although this statement is evidently colored by the soldier's antipathy for civil life, it represents, to some extent, the conditions that prevailed. Indeed, the court system and the question of appeals were subjects of frequent legislation by Constantine and, in order that "unfortunate men, involved in the evils of long and almost perpetual actions at law might soon escape from evil appeals and exacting cupidity," he sanctioned and introduced into the legal system of the empire the episcopal court, an institution characteristic of the life of the early church.[2]

The ideals of Christianity demanded that all problems of human life should be decided according to its standards. To this end the teachings of Jesus recommend a procedure in disputes among his followers different from that of the law courts, and St. Paul declared that the saints were more worthy to act as judges than the unjust.[3] The *Didake* or Teaching of the Twelve Apostles, which represents the Christian life of the second century, forbids "one who has a dispute with his fellow" to commune with his congregation, nor should any one speak to him until his repentance.[4] The result was the development of a jurisdiction of the congregation over other than the moral actions of its members.

[1] *Historia Annorum*, xxx, 4.

[2] *Constitutiones Sirmondi*, i (331). *Cf. seq.*, p. 90, foot-note. For legislation on appeals, *C. Th.*, ix, i and xi, 30.

[3] Matt., 18, 15-17; 1 Cor., 6, 1-3. [4] *Didake*, 14, 2; 15, 3.

The so-called apostolic constitutions, an epitome of Christian tradition and practice of the third and fourth centuries, reveal a well-developed administration of justice. Minor suits and difficulties were heard by the deacons, more serious ones by the bishop, who, each Monday, surrounded by deacons and presbyters, heard pleas and rendered decisions.[1] The rules which guided the bishop and the officers assisting him were not those of the common law, but were suggested by the spiritual conceptions of Christianity. These required that the rulers of this world should not pass sentence on the Christian; if possible the contending parties should be reconciled without the judgment of the bishop; but his sentence, once rendered, must be accepted as final, on pain of excommunication, for whom he punishes and separates "is rejected from eternal life and glory, . . . dishonorable among holy men, and one condemned by God." [2]

The freedom from the limitations of the common law and the voluntary character of the litigations in the episcopal courts suggest an institution of Roman public life.

In early Indo-European law there was a custom by which two parties submitted their dispute to the decision of a third. This was accompanied by the deposit of a pledge which fell to the party in whose favor the decision was made, later to the arbitrator. If the unsuccessful litigant were dissatisfied, he might appeal to the people; but contemporaneously with the rise of a system of courts, the arbitrator found means to have his sentence enforced by the state; in fact, this custom was one of the essential factors in the transition from justice administered by self-help to orderly adjudication by the state. A survival of it is found in the Roman institution of *recepti arbitri*, by which the litigants voluntarily make two contracts, one between themselves, another with the

[1] *Const. Apost.*, ii, 44-51. [2] *Ibid.*, ii, 47.

arbitrator. This settlement of cases outside the courts, according to principles independent of (though not in conflict with) the formal law of Rome, was recognized in the administration of justice by the prætor. If one party failed to observe the contract, the other by a civil action (*actio de stipulatio*) invoked prætorian interference. On the other hand the prætor, as guardian of the law, limited the cases which might be submitted to this extra-judicial arbitration and made certain rules for its procedure. While the episcopal court was extrajudicial in character and was not recognized as a source of justice, it is evident that if the litigants entered into a contract before submitting to the bishop's arbitration, the successful party in the suit might call upon the civil authorities to enforce the decision.[1]

These two institutions, the *recepti arbitri* and the episcopal court, form the basis of two edicts by which Constantine gave the episcopal courts a place in the judicial system of the empire.[2] While ten years separate them, the

[1] The institution of *recepti arbitri* has been well treated by Matthias, *Die Entwickelung des römischen Schiedsgerichtes*, in the *Festschrift zum fünfzigjährigen Doctorjubiläum von Bernard Windscheid.* Rostock, 1888.

[2] These are the seventeenth and the first of the *Constitutions* of Sirmond, a collection of imperial edicts made in the seventeenth century by Sirmond, the French ecclesiastic and jurist. The source in which he found them was the conciliar records of the sixth century, where they were cited in demand for favors and privileges from the Germanic kings. Some of them are found in the Theodosian code, some are not. Among the latter, by far the most important are those under discussion. (The constitution of 331, however, had been published previously by Cujas in his edition of the Theodosian code.) Godefroy, the editor and commentator of the Theodosian code, questioned the authenticity of these two edicts of Constantine. He believed them to be ecclesiastical forgeries; but Haenel has successfully defended them in his edition. (*Corpus Juris Ante-Justiniani*, vol. iii, p. 140.) He believes the constitutions were originally a part of the first book of the Theodosian code, but on account of their subject-matter late manuscripts placed

later edict is an interpretation of earlier legislation which probably included an edict that has been lost.[1] They should therefore be regarded as defining an existing institution, not as successive steps in its formation.

By this legislation the episcopal arbitration was transformed into a legal mode of procedure. "Unfortunate men involved in long and almost perpetual actions at law" were given the privilege of removing their litigation at any stage of a civil process to the bishop, even against the will of their opponents.[2] Since the execution of the bishop's decision was through the regular courts and his opinion was given the sanction of the emperor as an interpretation of law, the place given him in the system of justice was similar to that of the judges of the public law courts.[3] Moreover, the conception of his office as arbitrator was that of an authority transcending the regular civil courts, for the justice he administered arose from his individual conception

them as an appendix to the sixteenth book, and on account of the transcription they were for a time lost. According to the edition of the Theodosian code by Mommesen and his students they form a collection older than the Theodosian code, perhaps were one of the sources used by its compilers.

[1] Religionis est, clementiam nostram sciscitare voluisse, quid de sententiis episcoporum vel ante moderatio nostra censuerit vel nunc servari cupiamus. Sirmondi, 1 (*anno* 331).

[2] Quicunque itaque litem habens, sive possessor sive petitor erit, inter initia litis vel decursis temporum curriculis, sive cum negotium peroratur, sive cum iam coeperit promi sententia, iudicium eligerit sacrosanctae legis antistitis, illius sine aliqua dubitatione, etiamsi alia pars refragatur, ad episcopum cum sermone litigantiam dirigatur. *Cons. Sir.*, 1.

[3] Itaque quia a nobis instrui voluisti, olim prorogatae legis ordinem salubri rursus imperio propagamus. . . . Sive itaque . . . ab episcopis fuerit iudicatum, apud vos, qui iudiciorum summam tenetis, et apud ceteros omnes iudices ad exsecutionem volumus pervenire. (Sirm., 1. *Cf.* Soz., ii, 9.) Testimonium etiam, ab uno licet episcopo perhibitum, omnes iudices indubitanter accipiant, nec alius audiatur, cum testimonium episcopi a qualibet parte fuerit repromissum. (*Cons. Sir.*, 1.)

of right and wrong; and as not even minors could appeal from his decision, he enjoyed a wider range of action than the civil judge; indeed, in this respect his jurisdiction was equal to that of the pretorian prefect.[1]

This recognition of the episcopal court as a source of secular justice is unique in the history of Roman jurisprudence. No civil court was ever given such unlimited authority. Since the first legislation upon the subject is lost, no definite and satisfactory interpretation of the bishop's position is possible. In view of the fact, however, that tradition prevented Christians applying to secular courts, it is not improbable that the bishops regarded the privilege given them by Constantine as a step toward securing exemption of the clergy from the civil courts.

After forcing the members of the synod of Milan in 354 to excommunicate Athanasius and to subscribe to the Arian creed, which he also required all bishops of the realm to accept, Constantius guaranteed an end of persecution by prohibiting the accusation of bishops in the public courts. But the purpose of his edict was not clearly stated, and a literal interpretation conferred exemption on bishops from the jurisdiction of the criminal courts. In it we find the origin and precedent for that examination of criminal charges against bishops by the ecclesiastical authorities prior to any action in the secular court, a privilege which was

[1] "Illud est enim veritatis auctoritate firmatum, illud incorruptum, quod a sacrosancto homine conscientia mentis illibatae protulerit. Omnes itaque causae, quae vel praetorio iure vel civili tractantur, perpetuo stabilitatis iure firmentur, nec liceat ulterius retractari negotium, quod episcoporum sententia deciderit." (*Cons. Sir.*, 1.) Minors were denied the right of appeal from the episcopal court by the same edict, while the arbitral contract of a minor might ordinarily be quashed by asking for an *integrum restitutio*. The same year that this edict was issued Constantine made the decision of the pretorian prefect final. *C. Th.*, xi, 30, 16.

extended to the entire clergy in the Frankish monarchy and was always one of the most difficult problems in mediæval politics.[1]

The introduction of the episcopal court with final jurisdiction in civil cases, the decision of controversies in this court according to the bishop's conception of right and wrong, and the episcopal exemption from the regular criminal procedure naturally caused confusion and abuse in a system of jurisprudence so long and symmetrically developed as the Roman law. Episcopal jurisdiction was therefore limited and redefined by the legislation of succeeding emperors.

The first step in this direction was taken by Gratian in an edict which recognized the right of the church courts to hear ecclesiastical cases but required criminal cases to be decided by the secular courts.[2] This legislation was ineffective and was repeated twenty years later by Honorius, who confirmed the jurisdiction of bishops over religious cases, ordering their deposition of priests to be enforced by police authorities if necessary, and required all other cases to be heard according to the law.[3] But the prerogative granted by Constantius had been readily assimilated with ecclesiastical tradition and custom. All efforts to revoke it failed. The commentaries on the execution of Priscilian by

[1] *C. Th.*, xvi, 2, 12. "Mansuetudinis nostrae lege prohibemus, in iudiciis episcopos accusari, ne, dum adfutura ipsorum beneficio impunitas aestimatur, libera sit ad arguendos eos animis furialibus copia. Si quid est igitur querelarum, quod quispiam defert, apud alios potissimum episcopos convenit explorari, ut opportuna atque commoda cunctorum quaestionibus audientia commodetur" (355). For the interpretation of this edict I am indebted to Godefroy, the seventeenth century editor and commentator of the Theodosian code.

[2] *C. Th.*, xvi, 2, 23.

[3] *Ibid.*, xvi, 11, 1; ii, 35, 41; *Const. Sir.*, 7.

the decision of a secular court, the condemnation of John Chrysostom by an ecclesiastical council, the opinion of Pope Gelasius that, according to Roman law bishops must be heard and condemned by an episcopal court before punishment by the civil authorities, and the reprimand of the exarch of Italy by Gregory the Great for imprisoning Bishop Blancus—all illustrate the impotence of imperial legislation when opposed to ecclesiastical privilege and custom.[1]

The revision of the episcopal court as a source of justice was begun by Arcadius and Honorius. Two edicts which are not found in the Theodosian code, limit its jurisdiction to cases in which both parties agree to submit to the bishop's arbitration.[2] Litigation in the episcopal court was thus reduced to the same basis as that of the *recepti arbitri;* but

[1] Priscilian: Sulpicius Severus, *Chronicon*, ii, 49. "Priscillianus vero, ne ab episcopis audiretur, ad principem provocavit, permissumque id nostrorum inconstantia, qui aut sententiam vel in refragantem ferre debuerant aut, si ipsi suspecti habebantur, aliis episcopis audientiam reservare, non causam imperatori de tam manifestis criminibus permittere." A twin-judgment of heresy and *maleficium* was brought against Priscilian; and Martin of Tours, in criticism of the trial, said: "Saevum etse et inauditum nefas, ut causam ecclesiae iudex saeculi iudicaret." *Ibid.*, ii, 50. Chrysostom, *Mansi*, iii, 1151. "Quoniam quorundam criminum accusatus Johannes noluit adesse, leges talem deponant. quo et ipse subiit." Gelasius (Migne, vol. lvi, p. 641), "nunquam de pontificibus nisi ecclesiam iudicasse; non esse humanarum legum de talibus ferre sententiam absque ecclesiae principaliter constitutis pontificibus," *etc.* Greg. Great, *Ep.*, 33.

[2] *Cod. Just.*, i, 4, 7; *ibid.*, 8. The latter is also the eighteenth of the constitutions of Sirmond. It is interesting to note that Augustus had given the Jews the privilege of deciding their religious cases according to their own law and custom, and this was confirmed by Theodosius the Great. As the Jewish patriarchs extended the exercise of this authority to secular matters, Arcadius required Jews living under the protection of the Roman government to submit their litigation to the common law courts. But if the patriarchal arbitration was agreed upon, the decision was final even if not in accord with the principles of Roman law. *C. Th.*, ii, 1, 10.

the court did not lose its privileged position in the judicial system of the empire. The bishop's decision, once rendered, was final, and was enforced through the public courts, indeed the pretorian prefect was directed to prevent any movement to quash it. Its validity therefore rested upon the standing of the bishop as a judge, not on an agreement to submit to the episcopal arbitration.[1] The essential element of Constantine's legislation, the introduction into the Roman judicial system of a court whose law and proceedure were as untrammeled as that of the *recepti arbitri,* and whose authority was as binding as that of the public judges, remained unaltered.

This restriction imposed by Arcadius and Honorius was openly disregarded by the church in so far as it applied to cases in which clerks only were concerned; indeed, the councils of the later fourth and the fifth centuries forbade the clergy to carry their litigation into the civil courts.[2] Valentinian III was therefore constrained to declare the jurisdiction of the bishop over the clergy as well as the laity to be invalid unless both parties agreed to accept his decision; further, that clerks could not force laymen to appear in the episcopal court; and that bishops had no privileged position before the law.[3]

[1] *Cod. Just.,* i, 4, 8. *Impp. Honorius et Theodosius, A. A. Theodoro, P. P.* "Episcopale iudicium ratum sit omnibus, qui se audiri a sacerdotibus eligerint, eamque illorum iudicationi adhibendam esse reverentiam jubemus, quam vestris deferre necesse est potestatibus a quibus non licet provocare. Per judicum quoque officia ne sit cassa episcopalis cognitio, definitione executio tribuatur."

[2] Carthage (397), c. 9; Arles (443 or 452), c. 31; Chalcedon (451), c. 9.

[3] *Nov. Val. III,* tit. 34. There are two other laws of Valentinian III which were quoted in the Middle Ages as granting exemption from the secular courts. *Cons. Sirmon.,* iii and vi. (*Cf.* Florus of Lyons, *Capitula, 2.*) But their purpose was to rescind the legislation of John the

In this legislation and the attitude of the church toward it we have the prelude to the problem of ecclesiastical courts in the Middle Ages. The existence and legality of the episcopal court were never questioned, but the nature and extent of its jurisdiction were serious matters. The state insisted that all criminal cases and those civil cases not submitted to the bishop by agreement should be heard by the secular courts; but the church councils of the fifth century continued to forbid clerks to resort to secular sources of justice.[1] Indeed, this prohibition seems to have been recognized by the civil authorities, for a gloss of the *Breviary of Alaric*, a sixth century compilation of Roman law, states that the requirement of mutual consent in cases heard by the bishop was repealed by Majorian so far as cases among clerks were concerned.[2] The privilege of applying to the episcopal court for justice became one of the traditions of the church. Benedict the Levite included in his collection of capitularies the constitution of 331 as a Roman law re-

Tyrant, which had subjected religious as well as civil cases of the clergy to the jurisdiction of the secular courts, and to guarantee the right of ecclesiastical courts to hear ecclesiastical cases.

[1] Angers (453), can. 19; Vannes (465), c. 9. Only with the permission of the bishop can clerks resort to the secular court. Carthage (401), c. 1, forbids a clerical witness in a clerical case decided by an ecclesiastical court to appear again as witness if the dissatisfied clerk appeals to the civil courts.

[2] *Lex Romana Visigothorum, Nov. Val. III*, c. 12. This statement has frequently been regarded as a forgery or a pious tradition. But not all of Majorian's legislation is extant; moreover, Marcian in 451 confirmed all the privileges which the orthodox emperors had conferred on the church and canceled all pragmatic sanctions that were contrary to ecclesiastical canons. *Cod. Just.*, i, ii, 12. These facts and the prevalent opinion that the glosses of the *Breviary* are derived from the existing commentaries on the law, suggest that there was good precedent for the statement of a repeal of Valentinian's legislation. See chap. vi.

enacted by Charlemagne.[1] Other canonists conscientiously perpetuated the tradition. Gratian accepted it, and Innocent III thought to correct his predecessors by ascribing the authorship of the law to Theodosius the Great.[2]

The prominence which the clergy acquired in Roman life and politics during the later empire enabled the bishops to exercise an influence on the administration of justice which was independent of their activity as ecclesiastical judges.

The custom of intercession with state authorities by rhetoricians, men of learning or wealth in behalf of the unfortunate, or of a patron for his client, was one of long standing in Roman public life; and the dependency of the weak upon the strong was emphasized by the economic conditions in the later empire. Something very similar to this intervention became one of the duties of the episcopacy. Ambrose of Milan wrote to Studius, a public official, urging him to adopt the conduct of Jesus toward the woman taken in adultery in preference to the legal punishment by the sword, while the intercessions of Basil of Cæsarea with the Emperor Valens in behalf of the province of Cappadocia and of Flavianus for the city of Antioch are trite illustrations of the influence which the bishops often exercised in the imperial administration.[3] The right of the judge to revise a penal sentence opened the way for episcopal intercession in the administration of criminal law. One of the duties of the priesthood, says Ambrose, is "to snatch the condemned from death, when it can be done without disturbance."[4] Abuses of this ecclesiastical interference in behalf

[1] *Capitula*, vi, 366.

[2] Decretum, C. XI, qu. 1, cc. 35-37; Decretal. Gregor. IX, II, 1, de judiciis, c. 13.

[3] Amb., *Ep.*, vii, 58; Neander, *General Church History*, vol. iii, p. 190.

[4] Amb., *De Officiis*, ii, 29.

of the criminal classes led Theodosius and Arcadius to forbid an appeal through the clergy after condemnation, except in those cases where the appeal was prompted by a sense of humanity or a failure of justice.[1] Honorius directed the judges to produce the prisoners from their cells on the Sabbath and to ask them if they had received humane treatment. The conclusion of the edict encouraged the bishops to exhort the judges to fulfil this humane duty. Indeed, St. Augustine intimates that prisoners were often released from confinement on condition that they be subjected to ecclesiastical penance.[2]

Closely associated with clerical intercessions was the refuge which church edifices offered the unfortunate. The protection of sacred buildings, altars, or statues of the emperor was a custom of classical law inherited from that primitive age when religious institutions afforded the only protection from a system of justice administered by self-help or popular vengeance. When the church was recognized as a legal corporation, and the clergy began to have an influence in public life, nothing was more natural than

[1] *C. Th.*, ix, 40, 15, 16. The interference of monks in judicial procedure was responsible for an edict of Theodosius which required those following the monastic life "to inhabit desert places and vast solitudes." *Ibid.*, xvi, 3, 1. The law was repealed two years after its enactment (392). *Ibid.*, xvi, 3, 2.

[2] *Ibid.*, ix, 3, 7. This interest of the bishop in criminal justice was extended in the legislation of Justinian by requiring the bishops to visit the prisoners every Friday and Sunday, examine the crimes which each prisoner had committed, inquire into the treatment of the jailor, and report to the state authorities whatever was done contrary to good order. *Cf. Cod. Just.*, i, iv, 22. Aug., *Ep.* 153, c. 3: "Nam quosdam quorum crimina manifesta sunt, a vestra severitate liberatos, a societate tamen removemus altaris, ut poenitendo placare possint quem peccando contempserant, seque ipsos puniendo." This letter is a defense and justification of episcopal intercession which had been criticized by Macedonius in a letter to Augustine, which precedes the letter of Augustine in the edition of Migne's *Patrologia*.

that this privilege of asylum should be transferred to Christian places of worship. Indeed, the ecclesiastical asylum was recognized by custom long before it became a subject of legislation; its purpose was to protect the one seeking it until the bishop or priest might make intercession in his behalf.[1] Principally two classes of people, debtors and slaves, seem to have taken advantage of this protection and aid offered by the church. The same year that Theodosius sought to restrict episcopal intercessions he required the bishop to surrender debtors of the fiscus who sought refuge in the churches and forbade clerks to defend them or to pay their debts.[2] Arcadius sought to prevent curials from accepting ecclesiastical aid by requiring those clerks who offered them pecuniary assistance to pay the full amount of the debts. He also ordered that slaves should not receive the benefit of asylum for more than one day; their masters should be notified by the church officials and they, out of regard for those to whom the slave had fled, should refrain from inflicting punishment.[3] Another edict designated the

[1] Baronius, *Annales, anno* 324, gives a law of Constantine granting asylum rights to the church. This is a forgery. The earliest mention of the institution in ecclesiastical sources seems to be the council of Sardica, 343 (c. 7), where the members agree to the resolutions of Hosius that aid shall not be denied those who flee to the church. Numerous instances of the exercise of the protection of the church are given by Godefroy. *C. Th.*, ix, 45, 1. Purpose, *cf.* C. Orange (441), c. 5. Eos qui ad ecclesiam confugerint tradi non oportere, sed loci reverentia et intercessioni defendi.

[2] *C. Th.*, ix, 45, 1.

[3] *Ibid.*, 45, 3 and 5. The first of these edicts was enacted through the influence of Eutropius. Chrysostom of Constantinople had defended a number of individuals from the violence of Eutropius, who, in vengeance, had the customary asylum privileges of the church limited (398). The following year, however, Eutropius sought refuge from the anger of the Goths at the altar of the church, and Chrysostom interceded with the barbarians for him. The law was then repealed. Soz., viii, 7. The latter edict is dated 432.

altar and all parts of the church buildings as places of refuge; no one seeking asylum there should be removed on pain of death; but force could be used if the refugees were armed and refused to deliver their weapons at the command of the clerks; while Honorius recognized the space of fifty paces from the doors of the church as holy ground and made its violation a sacrilege.[1]

The recognition of the sanctity of the priesthood caused the state, in the reign of Theodosius and Gratian, to invest the clergy with certain privileges in the secular courts. It was forbidden to force bishops to bear witness in criminal cases, a privilege which was extended in the Justinian law to an exemption from presenting any kind of evidence in person.[2] Priests were also freed from all liability to torture,[3] and when a criminal charge was made against a clerk of any order the prosecutor was required to stake a pledge. If the prosecution failed, the pledge was taken by the fiscus, or if no pledge had been offered, the property of the prosecutor was confiscated.[4] Bishops who were the defendants in actions of assault and battery were given the right of representation by a *procurator* in a law of Valentinian III.[5] Endowed with these privileges, the clergy were able to extend their influence in the Justinian law and to maintain a

[1] *C. Th.*, ix, 45, 4 of 431. *Const. Sir.*, xiv. The latter edict also sanctions intercessions. The influence of this law is seen in the *Lex Romana Burgundionum*, ii, art. 5, and *Lex Visigothorum*, vi, tit. 5, c. 16.

[2] This exemption from bearing witness was perhaps the result of the movement in the church to prohibit appeals of ecclesiastical cases to the emperor. See Council of Constantinople, can. 5. *C. Th.*, xi, 39, 8 (381). *Novel. Justin.*, 123, 7.

[3] *C. Th.*, xi, 39, 10 (385).

[4] This law, an edict of Theodosius the Younger, is not in the Theodosian code. It was, therefore, probably repealed shortly after it was issued. It is given by Haenel, *Corpus Legum*, p. 241.

[5] *Nov. Val. III*, xxxiv.

recognition of their peculiar character in the new kingdoms that soon arose in the west.

The interpretation of the ideals and customs of a nation or society by means of its legislation is one of the most difficult of problems. If the historian sixteen centuries in the future should attempt to form an estimate of modern morality from our voluminous penal statutes, would he conclude that the world in our time was full of thieves, cutthroats and confidence men, or would he see in that legislation evidence of a refined sense of right and wrong, an attempt to add proportion and dignity to the temple of justice? When we read the ecclesiastical legislation of the Roman emperors we find a somewhat similar problem before us. Shall we interpret the privileges and immunities received by the church as a protection against certain phases of Roman life not in harmony with Christian ideals, and beneficent in that they prepared the church for the place it was to take in the civilization of the future? Or shall we interpret the career of the church by the legislation on heresy, and conclude that its policy was selfish, intolerant and antagonistic to the interests of the empire? These questions lead us into the field of hypothesis; each student will settle them for himself according to his temperament. But there are some conclusions in regard to the participation of the episcopacy in the legal life of the empire on which all may agree.

The most extensive privilege was granted by Constantine, the genuineness of whose religious conviction has been most questioned. Its limitation and reform were made by those whose piety and devotion to the church have never been doubted. One reason for this must have been that the business of the secular courts suffered by the competition of the ecclesiastical courts. Indeed the civil adjudication in which the episcopacy was involved as a result of Constantine's legislation was a burden against which the

spiritually minded clergy protested. Chrysostom believes that the difficulties of clerical arbitration are greater than those of the public judge, for it is hard for him to find the law, and having found it, also difficult not to violate it.[1] Augustine finds an opportunity in his *Commentary on the Psalms* to complain of those people who voluntarily seek the bishop's arbitration, yet when sentence has been given are dissatisfied because they can not appeal. And when an African council had charged him with certain affairs, he made a contract with his congregation that he should be released for four days of the week from the secular duties of his office.[2]

In addition to their work as civil judges, the bishops were active in the administration of secular property. Augustine says that the dying left the interests of their widows, children and property to the care of the church. Ambrose defended the possessions of the widow and orphan against the prosecution of the imperial fiscus.[3] Gregory Nazianzus declares that the people no longer seek in the priesthood physicians of the soul, but administrators of moneys, advocates and rhetoricians.[4] This activity of the bishop in the administration of civil law must have done much toward the development of a vulgar law and custom, differing in many details from classical jurisprudence. Truly, in the language of the worthy Otto of Freising, "as the empire decreased, the church adapted itself to the intermission, and began to appear in great authority."[5]

[1] *De Sacer.*, iii, 18.

[2] *Ps.* 25, 13; *Ep.*, 213. *Cf.* Possidius, *Vita Augustini*, 19.

[3] *De Officiis*, ii, 29.

[4] *Orat.*, 32.

[5] *Chronicon*, vii, prologus.

## CHAPTER VI

### The Influence of the Legislation of the Theodosian Code upon Early Mediaeval Jurisprudence

Any consideration of that legislation by which the church began its career as a privileged institution whose members were exempt from the economic obligations of citizenship, whose courts were recognized as sources of secular justice, and the corruptors of whose faith were punished with the loss of the distinctive rights of Roman citizenship, suggests the relation of these conditions to mediæval jurisprudence. By what process did the ecclesiastical law of the Theodosian code became known to the civilization in the west which succeeded the Roman Empire, and to what extent was that law influential in securing the privileges which the clergy enjoyed in mediæval society?

There was in the first place a direct transmission of the Roman imperial law, as it existed at the close of the fifth century, to the Teutonic kingdoms established in western Europe through the *Lex Romana Visigothorum*, or *Breviary of Alaric*.

In the second place there was a direct, although not extensive influence exercised by the code and *Novels* of Justinian upon Italian legal development in the sixth and seventh centuries and upon the later development in those centuries of the Visigothic law in Spain.

It will be advisable, first of all, to examine the Justinian code and its relation to the earlier imperial law as well as its immediate influence upon legal development in Italy.

One of the first problems that confronted Justinian was to bring order out of the confused ecclesiastical conditions in the empire, and there is no better evidence of the despotic strength, if not the wisdom, of his administration, than the policy by which this end was secured. Believing "faith in God" and "good order in the church" the only guarantees for the existence of monarchy, he revised and extended the privileges of the clergy and established an even more intimate union of church and state than had previously existed. The civil as well as the ecclesiastical litigation of the clergy was relegated to the jurisdiction of the bishops, and the participation of ecclesiastical courts in criminal processes against the clergy was recognized.[1] On the bishops were conferred the rights of supervising public works and municipal expenditures; the prerogative of nominating candidates for the administrative service of the empire; the privilege of assisting in the installation of governors; the duties of publishing new imperial legislation, of visiting prisons, and of hearing the complaints of the oppressed and unfortunate.[2] The privilege of appealing to the bishop in civil and criminal processes, and from him directly to the emperor was recognized, and at the request of the litigants, the bishop might sit with the secular judge in the civil court.[3] That the unity and supremacy of the civil authority were maintained while such machinery of government existed is sufficient witness of Justinian's ability to realize his conception of government.

The legislation above summarized was closely related to the rise of ecclesiastical influence in Italy which was coin-

[1] *Nov.*, lxxix; cxxviii, 21.

[2] *Nov.*, cxxviii, 16; *Cod. Just.*, I, iv, 26; *Nov.*, cxlix, 1; viii, 14; vi, epilogue 1; *Cod. Just.*, I, iv, 22, 26.

[3] *Nov.*, lxxvi, 1, 4, 9; *ibid.*, 2; *Cod. Just.*, I, iv, 7.

cident with the collapse of the civil administration during the later sixth and early seventh centuries. Justinian's law books were published in Italy after the reconquest of the peninsula in 552, and a pragmatic sanction extended the jurisdiction of the *Novels* to the west.[1] That the clergy was familiar with them is shown by the papal correspondence of the time. Pelagius, a contemporary of Justinian, repeats the rules of the *Novels* which restrict civil prosecutions against clerks to the jurisdiction of the bishop and prohibit the alienation of church property. Frequent references to the rights and privileges given the clergy by Justinian were made by Gregory the Great. As soon as he was elected Pope, he opened a correspondence with the Emperor Maurice, the Exarch of Ravenna and various officials of Africa, Sardinia and Naples. He received copies of new laws enacted by the emperor, which he doubtless published at Rome, and reported to Constantinople the oppression of the poor by the imperial officials. He petitioned the exarch for the repair of aqueducts and other public works at Rome, while his rights as bishop to supervise municipal finance and to interfere in behalf of justice are illustrated by an eloquent letter to Leontius.

That official, a representative of the central government, examined Libertinus, an ex-prefect of Rome, found him guilty of squandering public money, and had him scourged. Gregory, incensed at the infliction of such a penalty upon a Roman citizen, reproved Leontius and declared, "Had I found the accused guilty, it would have behoved me to warn you by letter and had I failed to obtain your attention, I should then have turned to the emperor."[2] Other letters

[1] Kruger, *Geschichte der Quellen und Literatur des römischen Rechts*, p. 354.

[2] Greg., *Ep.*, x, 51. This letter is interesting for the fact that it in-

show the Bishop of Rome interceding in behalf of the unfortunate, encouraging his fellow bishops to bring influence to bear on the secular judges in behalf of justice, and to send complaints against public officials to Rome, on the plea that "to coerce the violent laity is not to act against the law but to bring a support to it." [1]

The letters of Gregory also suggest that he was familiar with Justinian's legislation regarding the clergy and church property. He claimed for clerks the right to have civil cases in which they were defendants heard by the bishop, and interceded with the civil officials to prevent the forced service of ecclesiastics on public works.[2]

The law of Arcadius which recognized injury to church property as sacrilege had found its way into the Justinian code. To this Justinian added the prohibition of the alienation of church property except for the release of captives or other pious cause; provisions that what the abbot or bishop acquires in office is the property of the foundation; and that the property of clerks dying intestate and without heirs reverts to the church.[3] These rules made by Justinian are also reflected in the letters of Gregory, and his decisions on

timates that conflicts between ecclesiastical and civil jurisdiction might frequently occur. *Nov.*, cxxviii, 16, gives the bishop and a committee of five citizens the authority to examine public accounts and to remove guilty officials. This and similar legislation illustrates how the church stepped in and took the responsibilities of the decaying municipal organzation. *Cf. Cod. Just.*, i, 55, 8, which gave the bishop power to participate in the election of *defensores*. Justinian, in the Pragmatic Sanction of 554, gave the bishops of Italy authority to nominate judges. *Aliae aliquot constitutiones*, i, in Kriegel, *Corpus Juris Civilis*, vol. iii.

[1] *Ep.*, iii, 1, 5, 9; ix, 27, 47; xi, 3; xiv, 15. For the legislation of the code which gave the right to interfere in behalf of justice, see preceding page.

[2] *Ep.*, xi, 27; xi, 73, 99; xi, 5; *C. J.*, 1, iii, 2.

[3] *Nov.*, cxxxi, 13; cxx, 10; *C. J.*, 1, ii, 2; *Nov.*, cxxiii, 38.

the alienation of church property found their way into the canon law.[1]

Equally important for mediæval conditions was Gregory's activity in the administration of testamentary law. Justinian made the bishops the general guardians in the execution of charitable bequests and ordered that, if the executors failed to fulfil the provisions of such bequests, the bishop should intercede for a legal execution, that the reservation of the Falcidian Fourth for the benefit of the heirs should be denied, and that the whole property should be appropriated by the bishop for pious purposes.[2] By virtue of this authority Gregory informed the Duke of Sardinia that benevolent donations must be carefully executed, instructed the deacon Castorius to see that the terms of a testament in which the church was a beneficiary "should be fulfilled without impediment," decided that a bishop's estate and the property accumulated before his service in the episcopacy should revert to his son, and interfered for the just execution of a legacy in favor of the children of two freedmen.[3]

In the light of this extensive activity of the episcopacy in the administration of justice, why should not ecclesiastical decisions be recognized as a source of law? This was the conclusion of the clergy, and it is well illustrated by the development of testamentary law. While Justinian gave especial protection to benevolent bequests, he did not contemplate any alteration in the customary forms of testament; in fact, he clearly stated that he desired to avoid such a change.[4] But there was a feeling on the part of the

[1] *Ep.*, i, 68; vi, 126; vii, 13, 38; viii, 34; x, 1; xi, 10. *Cf. D.*, xii, qu. 2, cc. 13-14.

[2] *Nov.*, cxxxi, 11, 12.

[3] *Ep.*, i, 48; v, 28; iv, 37; x, 5. Interference in the latter case was the result of an appeal to Gregory.

[4] *Cod. Just.*, i, 2, 19.

clergy that testaments in favor of the church, especially clerical testaments, should not be limited by the customary forms of the civil law.[1] Gregory the Great shared this opinion, and in a letter to the subdeacon of Sicily ordered that the death-bed wish of a certain woman in the interest of the church, although verbally expressed, should be fulfilled.[2] This and a passage in the Gospel of St. Matthew were the sole precedents for the decree of Alexander III which made the last will expressed in the presence of the priest and two or three witnesses rescind any previous testament.[3]

The first decided influence of the ecclesiastical law of the Roman codes on the secular jurisprudence of the middle ages is found in the legislation of the Visigoths. Before the migration of this nation into southern Europe its laws and customs had come under the influence of Roman institutions, and with the formation of a monarchy in southern Gaul and Spain that influence increased. Visigothic institutions of private property in land, of loans and interest, of matrimony and of testament have their origin or received some modification in the contact with the more civilized Romans. While other conditions favored the union of the two peoples into one nation, they were separated by a religious problem. The Goths were Arians, their Roman subjects were Catholics. Very little is known of the ecclesiastical policy of the early Visigothic kings; they conferred gifts and favors upon the Arian church, but their legislation does not reveal any clerical influence such as that exercised after their conversion to Catholicism, while their

[1] Con. Lyons (567), c. 2.

[2] *Ep.* ii, 22.

[3] C. 13, x, 3, 26.

attitude toward the Catholics was one of toleration, except when political conditions made persecution necessary.[1]

Such were the conditions when the codification of Visigothic law began. Written laws were issued before the reign of Euric, but to him is attributed the first national code whose jurisdiction included cases between Goth and Roman as well as purely Gothic litigation.[2] There was no statement that cases in which Gothic interests were not involved should be heard according to Roman law, but the course of later legislation indicates that this was the custom. The sources of Roman law, however, which included the Hermogenian, Gregorian and Theodosian codes, the Theodosian *Novels* and the writings of the jurists, and interpretations of law now unknown were too voluminous, their language was not sufficiently clear for popular use, and custom had also made changes in their interpretation. These facts and the opportunity to conciliate his Catholic subjects, who had suffered persecution under Euric, and who, it was feared, might support the Franks in the conflict with that nation which seemed imminent, led Alaric II to undertake a compilation of Roman law for use in purely Roman litigation. This was the *Lex Romana Visigo-*

[1] Dahn, *Könige der Germanen*, vol. vi, p. 377. Alaric I recognized the ecclesiastical asylum of the Roman law; Gregory the Great gives evidence that the property rights of the Catholic church in Arles were respected; Athaulf, third king, married a Catholic, and there is conflicting evidence regarding the policy of Theoderic I, while the tolerance of Theoderic II was praised by Sidonius. The Catholic historian of the Spanish church, Gams, emphasizes the religious conflict (*Kirchengeschichte von Spanien*), while secular historians, notably Dahn, regard the conflict as occasional and intermittent and as the result of political complications.

[2] For the legislation of Euric and his predecessors, see Zeumer, *Geschichte des west-gothischen Gesetzgebung, Neues Archiv.*, Bd. xxiii, pp. 423, 468.

*thorum*, generally known as the *Breviary of Alaric*.[1] It is the work of a commission of provincial Roman lawyers and bishops. It was approved by a council of bishops and nobles and was then published in 506 with the command that in the future no other source of law should be used by Roman subjects. In its legislation and interpretations of law, which were derived from existing glosses, we have the Roman law of the fifth and early sixth centuries as it was applied in the courts.[2] A review of its provisions relating to the church and clergy will illustrate their position in an age when the civilizations of German and Roman were blending and ecclesiastical aims were coming to dominate both.

The political conditions under which the *Breviary* was compiled prevented any extensive reproduction of the imperial edicts against heresy. Only two of those in the Theodosian code were included, one in which Honorius ordered the "one and true Catholic faith" to be observed in

[1] The last edition of this code was published by Haenel (*Lex Romana Visigothorum*, Leipsic, 1848). Conrat has recently published a systematic arrangement of its material in German translation, with references and quotations from the text, after the fashion of the German handbooks of public and private law. (*Breviarium Alaricianum; Römisches Recht im fränkischen Reich in systematischer Darstellung*, Leipzig, 1903.)

[2] The glosses of the *Breviary* were formerly regarded as unimportant. But legal historians now recognize that they represent the custom of the later fifth and sixth centuries; indeed, that they are derived from older glosses now lost, and therefore are to be taken as a direct survival of later classical law. *Cf.* Haenel, *Lex Romana Visigothorum*, p. x; Blume, in *Bekker's und Muther's Jahrbuch des deutschen Rechts*, Bd. ii, 203; Fitting, *Zeitschift für Rechtsgeschichte*, Bd. xi, 228. On the other hand, one writer has rejected the view that the glosses are derived from previous commentaries (Degenkalb in *Kritische Vierteljahrschrift für Gesetzgebung und Rechtswissenschaft*, Bd. xiv, 505). For a summary of the discussion, see Karlowa, *Römische Rechtsgeschichte*, Bd. i, p. 977.

Africa, the other his confirmation of the legislation of Theodosius, while the *Novels* of Theodosius II and Valentinian III, enacted when heresy was no longer a political problem, were allowed to remain unaltered.[1] There is also only one law against apostasy, that of Valentinian II, which punished the apostate with loss of testamentary rights; but converts to Judaism were threatened with confiscation of property, and traffic in Christian slaves by Jews was prohibited.[2]

A more decided evidence of the influence of the clergy in the work of codification is the conception of church property. Paraphrasing passages in the *Institutes* of Gaius and the *Sentences* of Paul are statements that "things of divine law are churches, that is temples of God, and such patrimonies and properties as are among the rights of churches;" that an agreement to alienate religious property is invalid, and sacrilege is punishable by casting the offender to the wild beasts; and that only after debts and legacies to the churches "in honor of God" have been deducted from an estate, could the rule of the Falcidian Fourth be applied in the interest of the heirs.[3]

The laws treating of episcopal jurisdiction and the rela-

[1] *C. Th.*, xvi, 5 (*Lex Romana*); *Nov. Theod.*, i, 8, 9; *Nov. Val.*, i, 1.

[2] *Lex Romana* (*C. Th.*, xvi, 2, 1; 3, 2; 4, 1, 2).

[3] Gaius, ii, 1 (Haenel, p. 322; Conrat, p. 791). "Omnes (itaque) res aut nostri iuris sunt, aut divini, aut publici. . . . Divini sunt ecclesiae, id est, templa Dei, vel ea patrimonia ac substantiae, quae ad ecclesiastica iura pertinent." *Ibid.*, ii, 9, 5 (Haenel, p. 334; Conrat, p. 791).

Paul, iv, 3 (Haenel, p. 400; Conrat, p. 891). "Lex Falcidia similiter et Pegasianum Senatus consultum, factum hereditarii debiti ratione et separatis his, quae in honorum Dei ecclesiis relinquuntur, quartam hereditatis ex omnibus ad scriptum heredem consuit pertinere." The right of the church to receive bequests and to receive the property of clerks dying intestate and without heirs was also recognized. *C. Th.*, v, 3, 1. The *Novels* of Majorian (i, 1, 7) and Valentinian III (xii, 1, 5) were also included. Sacrilege, Paul, v, 21, 1.

tion of the clergy to the secular courts are also important. The edict of Constantius which allowed criminal charges against bishops to be examined by a synod of bishops and that of Gratian which required criminal accusations against clerks to be heard in the secular courts, were re-enacted.[1] The *Novel* of Valentinian limiting the civil jurisdiction of bishops over clerks and laymen to cases in which both parties submitted to his arbitration was also included, but the gloss states that Majorian repealed the restriction so far as it applied to clerks.[2] Ecclesiastical tribunals were granted exclusive jurisdiction over religious cases and church edifices were accorded the privilege of asylum, while the exemption of the clergy from the economic obligations of citizenship and the legislation of Valentinian and Majorian defining the relation of the *curiales* to the clerical profession were reproduced.[3]

Thus all the essential elements of that legislation by which the clergy secured its privileged position in the later empire, passed into the *Breviary*. It was by far the most widely known source of Roman law prior to the twelfth century, and was applied in the courts of southern Europe. The church, moreover, claimed the Roman as its personal law. We have therefore in the *Breviary* a statement of the position of ecclesiastical institutions in the custom of the early mediæval courts.

The purpose of the *Breviary* was to furnish a summary of Roman law for use in disputes between Romans when Goths and Romans were living as neighbors under the same royal authority, but preserving their respective

[1] *C. Th.*, xvi, 1, 2, 3 (*Lex Romana*). Bishops were also exempted from torture. *C. Th.*, xi, 14, 5.

[2] See preceding chapter, p. 96, n. 2.

[3] *C. Th.*, xvi, 1, 3, 4, 5 (*Lex Romana*); *C. Th.*, ix, 34, 1 (*Lex Romana*); *Nov. Val., III*, xii (*L. R.*); *Nov. Maior.*, 1 (*L. R.*).

laws and customs. An important step toward the union of the two races was made by Leovigild, who revised the code of Euric, repealed the ancient prohibition of the marriage of Goth and Roman and adopted the Roman system of blood relationship and the theory of the equality of sons and daughters in rights of succession.[1] The conversion of his son Reccared to Catholicism, and the recognition of that faith as the national religion, removed the last influence which separated Goth and Roman. It was now possible to formulate a national code of law applicable to all subjects of the kingdom. This was begun by Reccessvinth. His *Liber Iudiciorum,* published in the middle of the seventh century, was a compilation of the legislation of his predecessors and his own. It was intended to displace all other sources of law and to it all persons and people of the kingdom were subject.[2] Revised by Ervig and enlarged by Egica, it is known as the *Lex Visigothorum* and it was in theory at least the basis of Spanish jurisprudence until the thirteenth century.[3]

An examination of this code with reference to the sources of its legislation leads to the conclusion that, in addition to Visigothic law and custom and the *Breviary,* the Justinian jurisprudence was well known in Spain. The language of the *Lex Visigothorum* has never the dignity nor grace of

[1] The restriction upon intermarriage of Goth and Roman was perhaps caused by the policy of the Catholics, who hoped to convert the Goths from Arianism through mixed marriages. The marriage of Roman and barbarian was also prohibited in the *Breviary. C. Th.*, xii, tit. 14 (*L. R.*).

[2] Date, between the years 652 and 654. Zeumer, *Geschichte der westgothischen Gesetzgebung* (*Neues Archiv.*, Bd. xxiii, p. 486). Jurisdiction, *Lex Visigothorum*, ii, 1, 9. The words *Liber Iudiciorum* appear in the oldest manuscripts. Zeumer uses the name *Lex Quoniam* from the first words of the Edict of Reccesvind, by which it was promulgated. It is also known as the *Lex Visigothorum Reccessvindiana.*

[3] Time of revision and enlargement, 681 and 693. *Cf.* Zeumer, *N. A.*, Bd. xxiii, pp. 483, 488.

the Latin of the second and third centuries, which was so largely reproduced in the eastern law books, but the division of Reccessvinth's work into twelve books, the number of the Justinian code, the apparent correspondence of many Visigothic formulas with the law of the *Digest,* the precedent which the Justinian law offers for the Visigothic edicts on testament, representation, procedure and evidence, indicate an influence of the later Roman law on Visigothic jurisprudence in the period of its maturity. This probability is strengthened by the fact that from 554 to 624 there was a Byzantine province on the Levantine coast of Spain whose capital was Catalonia. Also, as late as the ninth, probably the tenth, century, a collection of Spanish laws included along with some of the legislation of Euric and the *Liber Iudiciorum,* imperial constitutions, portions of the *Institutes* and *Novels* of Justinian, and an epitome of the *Breviary;* while the purpose of the collection is to make known the "Roman laws" as "promulgated by our Lord Justinian." In the light of these facts, it is probable that Reccessvinth's prohibition of the future use of Roman and foreign laws refers to the law books of Justinian as well as to the *Breviary.*[1]

Other evidence of the survival of the Justinian law in Spain, pertinent to the theme of this chapter, is found by a comparison of its legislation on the episcopal courts with that of the *Lex Visigothorum.*

[1] De Ureña (*Literatura Juristica Española,* vol. i, p. 294) thinks that the prohibition refers to the Justinian law books alone and not to the *Breviary.* The collection referred to is in the Holkham Library, Norfolk, England. It has been published by Prof. A. Gaudenzi, of Bologna, under the title, *Un' antica compilazione di dirrito Romano e Visigoto con alcuni frammenti delle leggi di Eurico* (Bologna, 1886). A portion of it has been reprinted in the *Neues Archiv.,* Bd. xxiii, p. 389. A collection of Roman law was also made by Petrus de Grañon in the tenth century, which suggests a knowledge of Justinian legislation. *Cf.* Nicholas Antonio, *Bibliotheca Hispana Vetus,* vol. i, p. 518.

Three edicts, one of Chindasvinth, one of Reccessvinth, and one of Ervig, determined the place of the episcopal court in the legal system of the Visigothic kingdom after the conversion of the Visigoths to Catholicism.[1] The first of these provides that, if any one engaged in civil litigation believes that the decision of the judge has been influenced by prejudice, that official, with the aid of the bishop, shall review the case and issue a new decision. If there is still dissatisfaction, appeal may be made to the royal court, after the joint sentence of bishop and judge has been executed, on the plea of unjust judgment. If the appeal is then justified, the judge and bishop shall suffer the penalty of unjust judgment; if it is rejected, the appellant must suffer in the same manner. The second edict recognizes the bishop as the protector of the common people (*pauperes*) and establishes a procedure in case the judge shall refuse to re-hear the case with the bishop.[2] The bishop may then make an independent decision which the count must execute; and if the bishop refuses to hear the appeal or the count hesitates to enforce the episcopal decision, each shall forfeit one-fifth of the value of the suit. The third law reverts to the course of action outlined in the first. Bishop and judge shall hear the appeal together; if they can not agree, each shall commit his opinion to writing and send it to the king, whose decision shall be final.

[1] *Lex Vis.*, ii, 1, 24 (Chindasvinth), 30A (Reccessvinth), 30B (Ervig). In the interpretation of these laws I have followed Zeumer, *Neues Archiv.*, Bd. xxiv, pp. 79-88. References to the text are to his recent edition of the *Lex Visigothorum* in the *Monumenta Germania*, Leges, sec. 2, tom. 1 (1903).

[2] Different definitions have been given the word *pauperes*. Dahn and the older writers assign it a literal meaning, the poor or unfortunate. Zeumer thinks it refers to the people as opposed to the nobles and civil authorities. In such a sense it was used by the councils of Toledo (iv, c. 32) and Tours (ii, c. 23). *Neues Archiv.*, Bd. xxiv, pp. 80-81.

The only precedent for this legislation is the eighty-sixth *Novel* of Justinian, and a comparison leaves the impression that the one was the source of the other.[1] Justinian required the bishop to hear the case along with the civil judge suspected of prejudice, gave him the power to revise the sentence of the civil court, provided for a final appeal to the emperor, and inflicted the Roman penalty for unjust judgment on the bishop who gives an illegal decision, or on the appellant, if unsuccessful in his appeal. In one essential, however, the Justinian law differs from the Visigothic, in regard to the stage of the procedure when appeal may be made. In the former, appeal from a suspected judge is in order only before the formal joining of issue (*litis contestatio*); in the latter, the appeal may be made to the bishop at any stage of the process. This deviation is explained by a *Novel* of Valentinian, incorporated in the *Breviary,* which permits appeal without any limitation by the regular procedure.[2]

This reception and influence of the ecclesiastical law of Justinian in Spain is one of the most notable manifestations of that confusion of the civil and ecclesiastical authorities which was so notable in the centuries of transition from classical to mediæval civilization. It aided in that confusion of law and morality, of civil and ecclesiastical powers that followed the conversion of the Goths to Catholicism and continued to be one of the characteristics of Spanish life as late as the thirteenth century, when the earliest of the constitutional monarchies of Europe knew no conflict between church and state, for the two institutions were inextricably blended in the law and custom of the realm.

[1] *Nov.*, lxxxvi, was probably known in Spain through the *Epitome* of Julian (*Jul.*, lxix).

[2] *Nov. Just.*, liii, 3; *Jul.*, xlvii; *Nov. Val.*, xxxiv, 16, xii (*Lex Romana*).

The evidence for the influence of the Justinian jurisprudence on the ecclesiastical law of the Frankish empire is not so conclusive as that just reviewed. The Franks were not so susceptible to Roman influence as the Goths, and their kingdom was far more Germanic in population and institutions than that of their neighbors beyond the Pyrenees. While no manuscript of Justinian's law books which antedates the ninth century has been discovered in France, there were conditions in the Frankish empire which suggest an acquaintance with the ecclesiastical provisions of his code.

The election of a count by the bishop and the people, the nomination of another by St. Eligius of Tours, suggest the edicts of Honorius and Justinian which allowed the bishop to participate in the election of *defensores* and to nominate civil officers.[1] The capitulary of Chlothair II which states that in the absence of the king the bishop may force a judge to revise his unjust sentence, is similar in spirit to the appeal to the bishop provided for in the *Novels*.[2] A similar comparison might be made in the exemptions of the clergy from the secular courts. Chlothair's edict of 614 extended to the entire clergy the right of bishops to have criminal charges against them heard by a council of bishops, while personal actions against clerks were also conceded to the episcopal courts by the same edict—a privilege more explicitly guaranteed in the Mantuan capitulary of 787.[3]

The only precedent for such a policy is that of Justinian's *Novels*.[4] Moreover, that other procedures suggestive of

[1] Greg. Turon, *Hist. Francorum*, v, 47; *Vita St. Eligii*, i, 32. *Cf. C. J.*, I, 55, 8; *Nov.*, cxlix, 1.

[2] Cloth., *Praeceptio*, 6 (Boretius, p. 19); *Nov.*, lxxxvi.

[3] Boretius, i, p. 21, 4; *ibid.*, p. 196.

[4] *Nov.*, cxxiii, 31, makes the episcopal court a court of first instance for all personal actions against clerks, monks and deaconesses. For criminal actions, *cf. ibid.*, viii, p. 21.

Justinian's legislation were sometimes used, that the demands for exemption of clerks from the jurisdiction of the civil courts were more frequent and explicit in the middle and latter part of the sixth century, the time when the law books and *Novels* were published in the west, and that Justinian's legislation was known to some extent in the kingdom of Burgundy, which passed under Frankish control before the code was completed or the *Novels* were published in the west—these facts seem to increase the probability of the knowledge and use of Justinian's law prior to the ninth century.[1] And in that century the *Epitome* of Julian was well known, for from it was taken, word for word, the prohibition in the capitularies of Lewis the Pious of the alienation of church property, except in exchange for royal favors.[2]

If the precedents found in the Justinian law were effective in fixing the position of the church in the legislation of the Frankish kings, the *Breviary* of Alaric, as already stated, established its place in local custom and usage. Its forty manuscripts, nearly all found in Frankish territory, the frequent occurence of portions of it in the manuscripts of other collections of laws, the seven epitomes or minor codes for which it is the source, are evidence of the popularity of the *Breviary* in mediæval jurisprudence.[3] Something more

[1] A council of 794 directs that bishops and counts together decide cases involving clerks and laymen. (Boretius, i, 77). Hincmar, in his letter to Charles the Bald, mentions a method by which the king appoints judges who, with the bishops, decide mixed cases. *Ep.*, 40, Conc. Aur. (538), c. 32; *ibid.* (541), c. 20, Conc. Matiscon (585), c. 9 *et seq.* *Cf.* Nissel, *Der Gerichtstand des Clerus im frankischen Rcich*, pp. 112, 116; Conrat, *Gesch. der Quellen und Lit. des röm. Rechts*, vol. i, p. 37.

[2] Savigny, vol. ii, p. 100.

[3] *Cf.* Introduction and text of Haenel's edition and the Prolegomena to Mommsen's edition of the Theodosian code.

than tradition indicates that Charlemagne recognized and approved it as a source of justice, for the statement that "it was received and placed among the laws by Charles and his son Pippin" coincides with their recognition and confirmation of folk law, by which each nation was given the privilege of amending its own "wherever that was necessary and committing it to writing, in order that the judge might make decisions by written law . . . and all men, poor and rich, have justice in the kingdom." [1]

The ecclesiastical legislation of the *Breviary* was often the precedent for laws made by the councils and consequently found its way into the works of the canonists. The restriction on Jewish traffic in Christian slaves was more than once re-enacted.[2] The edict of Constantius which placed criminal accusations against bishops under the jurisdiction of the synod of bishops was cited in the demand for the immunity of clerks from procedure in the secular courts, as was also the law granting clerks exemption from taxation and public burdens.[3] The right of representation in criminal procedure given the bishops by Valentinian was extended to all grades of the clergy by an eighth century epitome of the *Breviary*.[4] The rule of Honorius on celibacy seems to have been the

[1] A manuscript of the *Epitome* of Aegidius, one of the compilations made from the *Breviary*, is the source of the first quotation (Conrat, *Ges. d. Q. u. L.*, p. 44); the second is from the *Annales Laurentientes, anno* 802. A clause of a lost capitulary also says: Constituta ex lege Salica, Romana, atque Gombata (Boretius, i, 170). Stobbe regards the passage in the *Annales* as a confirmation of folk-law. (*Geschichte der deutschen Rechtsquellen*, Bd. i, p. 20.) Likewise Conrat, p. 44, n. 4.

[2] Conc. Aurel. (538), 13; (541) 30, 31; Matiscon (581), 16; *Ben. Diacon.*, iii, 286; Burch. Worm., *Decret.*, iii, 90; Ivo Chart, i, 284; *cf. C. Th.*, xvi, 1, 4 (*Lex Romana*).

[3] Aurel (541), 20; Matiscon (585), 9; Paris (614), 4; *Ben. Diac.*, iii, 284; Ps. Isid, *Ep.*, Gaius. *Cf. C. Th.*, xvi, 1, 2 (*Lex Romana*); *Ben. Diac.*, iii, 185. *Cf. C. Th.*, xvi, 1. 1 (*Lex Romana*).

[4] *Nov. Val. III*, 12; *Epit. Monach.*

source for similar legislation of numerous councils, while the laws regarding heresy and apostasy were also known, but were not so frequently cited.[1]

It was from the *Breviary* also that the ecclesiastical authorities derived many of those legal principles which gave the canon law its distinctive character as a system of justice. The rules that the accuser in a criminal action who fails to prove his charge must suffer the penalty involved, that those accused of crime and not proved innocent can not give testimony in a criminal process, that the judge can not examine until a formal accusation has been made, and the extension of the conception of crime from physical injury to libel—these principles of the canon law have their source in the *Breviary* of Alaric.[2] They illustrate how direct was the transition from the later Roman to the ecclesiastical justice of the middle ages, and, when compared with the contemporary legal ideals of the Germanic nations, they explain the popularity of the court Christian. Indeed the references to the sixteenth book of the Theodosian code by the canonists are far less frequent than to those titles of the ninth book and the portions of the *Sentences* of Paul which treat of evidence, procedure and appeal—a fact that indicates that the chief concern of the church in the early middle ages was not the maintenance of ecclesiastical privileges, but the work of directing the varied social activities of mankind.

[1] Löning, Bd. ii, p. 323; *Ben. Diac.*, iii, 188, 287; Ps. Isid., *Ep.*, Analect, ii; *Ep.*, Gaius; *Lex Bav.*, i, 13, art. 2.

[2] *Ben. Diac.*, iii, 164; Burchard, vol. i, p. 164; Ivo Pann., iv, 111; Ivo Chart., xvi, 248. It is interesting to notice that Gratian was not acquainted with the *Breviary*, but he was familiar with its legislation through the acts of the councils. There is also no evidence of use of the *Breviary* by the Popes.

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